Petition

81-646
No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

NOVACK INVESTMENT COMPANY d/b/a BUDIG WESTERN TRUCKING and ALVIN S. NOVACK,
Petitioners,

vs.

CHESTER W. SETSER,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals For the Eighth Circuit

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QUESTIONS PRESENTED FOR REVIEW

I. Did The Court Of Appeals Err In Holding That There Is A Cause Of Action Based Upon 42 U.S.C. § 1981 For Retaliation Against An Employee Who Makes A Complaint To The Equal Employment Opportunity Commission?

II. Did The Court Of Appeals Err In Holding That Respondent Is Entitled To A Jury Trial In His Action Brought Pursuant To 42 U.S.C. § 1981?

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
Table of Contents	iii
Table of Authorities	iii
Citations to Opinion Below	1
Jurisdictional Statement	2
Statutes Involved	2
Statement of Case	3
Jurisdiction of Federal Court	4
Reasons for Granting Writ	5
Appendix A	A-1
Appendix B	A-20
Appendix C	A-33

TABLE OF AUTHORITIES

Cases Cited

Booker v. Electrical Workers Union No. 2021, IBEW, 431 F. Supp. 1035 (D.C.W.D. Okla. 1977)	9,10
DeMatteis v. Eastman Kodak Co., 511 F.2d 306 (2nd Cir. 1975)	7
Grant v. Bethlehem Steel Corp., 23 EPD ¶30,941 (D.C. N.Y. 1978) *aff'd.* 622 F.2d 43 (2nd Cir. 1980)	5,8

Hudson v. International Business Machines Corporation, et al., 620 F.2d 351 (2nd Cir. 1980), *cert. den'd.* ____ U.S. ____, 101 S.Ct. 794, 66 L.Ed.2d 611 (1980) 5,6,7

Hudson v. International Business Machines, Inc., 9 EPD ¶9,991 (D.C.N.Y. 1975) 5,6

Lynch v. Pan American World Airways, 475 F.2d 764 (5th Cir. 1973) 8,9,10

Runyon v. McCrary, 427 U.S. 160; 96 S.Ct. 2586 (1976) 6

Takeall v. Werd, Inc., 19 EPD ¶9,035 (D.C.Fla. 1979).. 5

Tramble v. Converter Ink Company, 343 F.Supp. 1350 (D.C.Ill. 1972) 5

Walton v. Rockwell International, 24 EPD ¶31,266 (D. C.Cal. 1980) 5

Winston v. Lear-Siegler, Inc., 558 F.2d 1266 (6th Cir. 1977) 7,8

Statutes Cited

42 U.S.C. § 1981 2,3,4,5,6,7,8,9

42 U.S.C. § 2000e-3(a)..... 2,6

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CITATIONS TO OPINIONS BELOW

The Opinion of the three judge panel of the Eighth Circuit Court of Appeals which contains that Court's decision relating to the issues here involved is reported at 638 F.2d 1137 (8th Cir. 1981). A copy of that Opinion is printed in Appendix A hereto, *infra,* pages A-1 through A-19. The Opinion of the Eighth Circuit Court of Appeals En Banc, upon rehearing, relating to issues not involved herein, is not yet reported but is printed in Appendix B hereto, *infra,* pages A-20 through A-32. The Judgment and Opinion of the District Court after trial is not reported but is printed in Appendix C hereto, *infra,* pages A-33 through A-39.

JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Eighth Circuit, by a three judge panel, rendered its original Opinion herein on January 26, 1981. Such Opinion contains the issues which Petitioners seek to review herein. Petitioners filed a Motion for Rehearing before the Court En Banc, which was granted. After additional Briefs and oral argument, the Eighth Circuit Court of Appeals En Banc entered its Opinion and Judgment on July 21, 1981. Jurisidiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

42 U.S.C. § 1981 provides as follows:

> "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

Section 704(a) Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-3(a) provides:

> "(a) It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any in-

dividual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter."

STATEMENT OF CASE

Respondent, Chester W. Setser, is a white male truck driver. Respondent's Complaint is based solely upon alleged violations of 42 U.S.C. § 1981. Respondent alleges that he was the victim of reverse discrimination when Petitioner Novack Investment Company and its chief operating officer, Petitioner Alvin S. Novack, did not hire him in October 1973. Respondent further claims that 42 U.S.C. § 1981 was violated when Petitioners allegedly retaliated against him for filing a complaint with the Equal Employment Opportunity Commission after the October 1973 refusal to hire Respondent.

Prior to trial, the District Court struck, *sua sponte,* Respondent's demand for jury trial.

Likewise, prior to trial, Petitioners moved the Court to strike Respondent's claim under 42 U.S.C. § 1981 based upon alleged retaliation for having filed a charge of discrimination with the Equal Employment Opportunity Commission. The Court took said motion under consideration with the case.

The case was tried in July 1978. Respondent was seeking monetary damages for backpay, lost insurance benefits, expenses seeking alternative employment, pain and suffering, punitive damages, interest, attorneys' fees and costs. On January 7, 1980 the Court rendered its Opinion and Judgment in favor of Petitioners. Respondent appealed to the United States Court of Appeals for the Eighth Circuit. The Eighth Circuit Court of Appeals reversed the District Court, holding that

Respondent is entitled to a jury trial, that 42 U.S.C. § 1981 does support a claim of retaliation on account of filing a charge with the Equal Employment Opportunity Commission and that the issue of damages in the form of back pay is properly an issue for the jury.

JURISDICTION OF FEDERAL COURT

This action is one for alleged violation of 42 U.S.C. § 1981 and jurisdiction is pursuant to 28 U.S.C. § 1343.

REASONS FOR GRANTING WRIT

I.

The Appeals Court Erred In Holding That There Is A Cause Of Action Based Upon 42 U.S.C. §1981 For Retaliation Against An Employee Who Makes A Complaint To The Equal Employment Opportunity Commission.

The decision of the Eighth Circuit Court of Appeals herein is in apparent conflict with the decision of the Second Circuit Court of Appeals in the case of *Hudson* v. *International Business Machines Corporation, et al.*, 620 F.2d 351 (2nd Cir. 1980), *cert. den'd.* ____ U.S. ____, 101 S.Ct. 794, 66 L.Ed.2d 611 (1980). Furthermore, the holding of the Eighth Circuit herein is in direct conflict with previous decisions of various District Courts. *Tramble* v. *Converter Ink Company,* 343 F.Supp. 1350 (D.C.Ill. 1972); *Walton* v. *Rockwell International,* 24 EPD ¶31,266 (D.C.Cal. 1980); *Hudson* v. *International Business Machines, Inc.*, 9 EPD ¶9,991 (D.C.N.Y. 1975); *Grant* v. *Bethlehem Steel Corp.*, 23 EPD ¶30,941 (D.C.N.Y. 1978) *aff'd.* 622 F.2d 43 (2nd Cir. 1980); *Takeall* v. *Werd, Inc.*, 19 EPD ¶9,035 (D.C.Fla. 1979).

It was Plaintiff's (Mr. Setser's) contention at trial that Defendants refused to consider him for employment on account of his filing with the Equal Employment Opportunity Commission a charge of discrimination. 42 U.S.C. §1981 does not support a private cause of action based upon retaliation. 42 U.S.C. §1981 provides as follows:

> "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give

> evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and no other."

Such Section only affords protection to persons who are discriminated against on account of *race*. Any other basis of discrimination, such as sex, religion or age, is not protected by 42 U.S.C. §1981. *Runyon* v. *McCrary*, 427 U.S. 160; 96 S.Ct. 2586 (1976).

Section 704(A) of Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. §2000e-3(a)), on the other hand, does provide for a claim based upon retaliation for filing a claim with the Equal Employment Opportunity Commission. The mere fact that Title VII provides a specific remedy for retaliation does not mean that 42 U.S.C. §1981 also provides such a remedy. 42 U.S.C. §1981 speaks only to discrimination based upon race. It is silent concerning any claim based upon retaliation. On the other hand, Title VII specifically addresses retaliation. (42 U.S.C. §2000e-3(a)).

The recent case of *Hudson* v. *International Business Machines Corporation, supra,* and the subsequent Petition for a Writ of Certiorari to this Court in connection with that case, cast doubt upon the Court of Appeals' decision and Order herein. In that case, the plaintiff claimed that he had been discriminated against in violation of §1981 on account of filing a complaint with the New York State Human Rights Division alleging that IBM had discriminated against him. The trial court dismissed Hudson's claim of discrimination based upon retaliation. *Hudson* v. *IBM,* 9 EPD ¶9,991, (S.D.N.Y. 1980). It held that there is no such action which can be maintained pursuant to 42 U.S.C. §1981. The Second Circuit, on appeal, refused to overrule the District Court's determination that no cause of action for retaliation can be based upon §1981. *Hudson* v. *Inter-*

national Business Machines Corporation, 620 F.2d 351 (2nd Cir. 1980). Subsequently the plaintiff filed his Petition for Writ of Certiorari to the Supreme Court. In said Petition, the very question herein was presented to the Supreme Court.

> "Did the court of appeals incorrectly hold that petitioner could not maintain a retaliation action under the 1866 civil rights act?" (22 EPD ¶30,828. Dkt. No. 80-530.)

The Supreme Court denied said Petition for a Writ of Certiorari. 66 L.Ed.2d 611, 24 EPD ¶31,375 (1980).

The Eighth Circuit Court of Appeals' holding that there is a cause of action under 42 U.S.C. §1981 is based principally on the Sixth Circuit case of *Winston* v. *Lear-Siegler, Inc.,* 588 F.2d 1266 (6th Cir. 1977). The soundness of *Winston* v. *Lear-Siegler, Inc., supra,* is now to be seriously questioned. The Sixth Circuit, in *Winston* v. *Lear-Siegler, Inc., supra,* relied very heavily on the Second Circuit's alleged rationale in the case of *DeMatteis* v. *Eastman Kodak Co.,* 511 F.2d 306 (2nd Cir. 1975), modified 520 F.2d 409. The Second Circuit's decision in *DeMatteis* v. *Eastman Kodak Co., supra,* held that an employee of Eastman Kodak Company had a cause of action when Kodak allegedly forced him to retire early for having sold his home to a black fellow employee. It held that §1981 provided relief.

The Second Circuit, since the *DeMatteis* case, has consistently refused to hold that §1981 provides relief for alleged retaliation for having filed charges of discrimination with the EEOC or other agencies. The Second Circuit has refused to extend and interpret the holding of the *DeMatteis* case, *supra,* in the same way as did the Sixth Circuit in *Lear-Siegler, supra.* To the contrary, the Second Circuit, in the *Hudson* case, *supra,* did not mention its *DeMatteis* decision. It did not, in any way, even intimate that the Second Circuit questioned the rationale of *Tramble, supra,* — that is, §1981 does not provide relief for alleged retaliation based upon the filing of a charge of discrimination with a civil rights enforcement agency.

Moreover, the Second Circuit, in *Grant* v. *Bethlehem Steel Corp., supra,* did not reverse the district court's determination that no §1981 action was available for claims of retaliation when reviewing that court's judgment based solely upon Title VII. The basis of *Lear-Siegler* is now most suspect. Therefore, the holding of the Eighth Circuit herein likewise is not well founded.

II.

The Appeals Court Erred In Holding That Respondent Is Entitled To A Jury Trial In His Action Brought Pursuant To 42 U.S.C. §1981.

The decision of the Eighth Circuit Court of Appeals herein is in direct conflict with the decision of the Fifth Circuit Court of Appeals in the case of *Lynch* v. *Pan American World Airways,* 475 F.2d 764 (5th Cir. 1973). In *Lynch, supra,* the Fifth Circuit unequivocally held that a plaintiff is not entitled to a jury trial in an action based upon 42 U.S.C. §1981.

In *Lynch, supra,* the employee, like Respondent in this case, filed an action based on 42 U.S.C. §1981. The employee in that case, like Respondent in this case, requested back pay and compensatory and punitive damages. The district court in *Lynch,* like the District Court herein, strick the employee's request for a jury trial. The Fifth Circuit Court of Appeals affirmed the district court's action relating to the request for jury trial. At page 765, the Fifth Circuit Court of Appeals held:

> "A claim for reinstatement is equitable in nature. The imposition of monetary damages to make the employee whole for lost backpay does not change the character of the proceeding and thereby mandate a jury trial. Harkless v. Sweeny Independent School District, 5 Cir., 1970, 427 F.2d 319; Johnson v. Georgia Highway Express, Inc., 5 Cir. 1969, 417 F.2d 1122; Smith v. Hampton Training

> School for Nurses, 4 Cir., 1966, 360 "F.2d 577; Williams v. Travenol Laboratories, Inc., N.D.Miss., 1972, 344 F.Supp. 163. Neither may the Plaintiff - by framing his prayer under § 1981 or by making unsupported allegations for compensatory and punitive damages - unilaterally alter the genre of the proceeding."

The Respondent herein would distinguish *Lynch* from the case at bar on the basis that Respondent did not pray for reinstatement and, therefore, the action was not in the nature of equity. As the court in *Booker* v. *Electrial Workers Union No. 2021, IBEW*, 431 F.Supp. 1035 (D.C.W.D. Okla. 1977) stated, at page 1036:

> "The demand for back pay (in this case lost wages, which is the same) is not in the nature of a claim for damages but rather an integral part of the statutory equitable remedy to be determined through the exercise of the court's discretion and not by a jury."

The court in *Booker* specifically held that any such claim for lost wages pursuant to 42 U.S.C. §1981 would not entitle the plaintiff to a jury trial.

Moreover, Respondent, in this case, did not seek reinstatement for the reason that Petitioners went out of the trucking business in August, 1976, thereby eliminating any position for Respondent. The mere fact that reinstatement is not specifically prayed for does not magically change a prayer for back wages from an equitable remedy to a legal remedy.

Petitioners know of no other decision of a Court of Appeals contrary to the decision handed down in *Lynch* v. *Pan American World Airways, Inc., supra.* Petitioners are not unaware of some district court cases holding that, whereas a claim for lost wages may not be tried by a jury, a claim for mental distress, embarassment and punitive damages is triable by a

jury. Such a position is not supported in view of the reasoning of the court in *Lynch* v. *Pan American World Airways, Inc., supra,* and the *Booker* v. *Electrical Workers, etc.* case, *supra.*

In view of the Fifth Circuit Court of Appeals case diametrically opposed to the decision of the Eighth Circuit herein, it is important that this Court resolve the conflict in the Circuits and grant Petitioners' Petition for a Writ of Certiorari on this very important issue.

CONCLUSION

Petitioners respectfully pray that the Supreme Court issue a Writ of Certiorari to the Eighth Circuit Court of Appeals in the herein matter to review the issues presented herein.

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APPENDIX

APPENDIX A

United States Court of Appeals
For The Eighth Circuit

No. 80-1100

Chester W. Setser,
Appellant,

v.

Novack Investment
Company d/b/a Budig
Western Trucking and
Alvin S. Novack,
Appellees.

Appeal from the United States
District Court for the Eastern
District of Missouri.

Submitted: October 13, 1980

Filed: January 26, 1981

Before STEPHENSON and HENLEY, Circuit Judges,
and HUNTER,* District Judge.

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*The Honorable Elmo B. Hunter, Chief Judge, United States District Court for the Western District of Missouri, sitting by designation.

HUNTER, District Judge.

This is an appeal from a final judgment entered below against the appellant Chester Setser and in favor of appellees Novack Investment Co. d/b/a Budig Western Trucking Co. and Alvin S. Novack.[1] For the following reasons, we reverse and remand for jury trial.

Appellant brought his action alleging only violations of 42 U.S.C. § 1981 [§ 1981].[2] Appellant, a white male, contended in the district court that he was refused employment with appellees in the fall of 1973 for the unlawful reasons of racial discrimination and retaliation by appellees after appellant filed a charge of discrimination with the Equal Employment Opportunity Commission [EEOC]. Appellant argues on appeal that the district court erred in striking his demand for jury trial and that the district court erroneously found that the appellees did not discriminate or retaliate against appellant. Appellees contend that even if they did discriminate, they did so lawfully because they were following affirmative action guidelines pursuant to

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[1]The case was tried to the district court on July 17-19, 1978, and on January 7, 1980, the district court entered its Memorandum and Order in favor of appellees.

[2]Section 1981 provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Executive Order 11246.[3] Further, appellees assert that as a matter of law retaliation is not cognizable as a cause of action under § 1981.

I.

The complaint sought only monetary damages for backpay, lost insurance benefits, expenses incurred in seeking alternative employment, inconvenience, humiliation and embarrassment, pain and suffering, punitive damages, interest, attorneys' fees and costs. The appellant moved for a jury trial and the appellees opposed such a request only for the claims seeking lost wages, interest, attorneys' fees and costs. On November 8, 1977, the district court, *sua sponte,* entered its order denying appellant's demand for jury trial on all issues. The district court's order explained the ruling by stating that "this court has consistently held that a jury trial is unavailable in § 1981 cases."

Appellant argues that there is a constitutional guarantee of the right to a jury trial under the Seventh Amendment in an action brought pursuant to § 1981 on all claims for "legal" relief.[4] Even though the Supreme Court has yet to identify specifically the parameters of the jury trial right in § 1981 actions, an

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[3]This regulation requires that as a matter of public policy, federal contractors adopt affirmative action policies to prevent discrimination against any employee or applicant for employment because of race, color, religion or national origin. *See* 3 C.F.R. § 339. Appellees were, in part, government contractors and were covered by this regulation. *See United Steelworkers of America* v. *Weber,* 443 U.S. 193, 223 n.2 (1979). For an exhaustive study of the background of Executive Order 11246, *see Contractors Ass'n. of Eastern Pa.* v. *Secretary of Labor,* 442 F.2d 159, 168-71 (3d Cir. 1971); and Comment, *Executive Order No. 11246: Presidential Power to Regulate Employment Discrimination,* 43 MO. L. REV. 451 (1978).

[4]Appellant does not contend that attorneys' fees, interest and costs should be jury issues.

analysis of various judicial authorities indicates that parties are constitutionally entitled to jury trials under § 1981 on all legal claims. The Supreme Court has definitively held that "[t]he Seventh Amendment does apply to actions enforcing statutory rights, and requires a jury trial upon demand, if the statute creates legal rights and remedies enforceable in an action for damages in ordinary courts of law." *Curtis* v. *Loether*, 415 U.S. 189, 194 (1974).[5] And, it is clearly settled that actions brought pursuant to § 1981 afford plaintiffs both legal and equitable relief. *See Johnson* v. *Railway Express Agency*, 421 U.S. 454 (1975). The legal rights available include "compensatory and, under certain circumstances, punitive damages." *Johnson* v. *Railway Express Agency, supra*, 421 U.S. at 460. *See also Johnson* v. *Ryder Truck Lines, Inc.*, 575 F.2d 471 (4th Cir. 1978); *Garner* v. *Giarrusso*, 575 F.2d 300 (5th Cir. 1978); *Mahome* v. *Waddle*, 564 F.2d 1018 (3d Cir. 1977); *McCrary* v. *Runyon*, 515 F.2d 1082 (4th Cir. 1975), *aff'd.*, 427 U.S. 160 (1976); *Tucker* v. *Harley Davidson Motor Co.*, 454 F. Supp. 738, 743 (D. Wis. 1978); *Peterson* v. *Lehigh Valley Dist. Council*, 453 F. Supp. 735 (E.D. Pa. 1978). Further, many lower courts have recognized the appropriateness of submitting all legal contentions encompassed within a § 1981 cause of action to the jury. *See Santos* v. *Mt. Sinai Hospital*, ____ F. Supp. ____ (S.D.N.Y. 1980); *Seymore* v. *Reader's Digest Ass'n., Inc.*, 493 F. Supp. 257, 267 (S.D.N.Y. 1980); *Johnson* v. *Sea Drilling Corp.*, 486 F. Supp. 462, 463-64 (E.D. La. 1980); *McCrary* v. *Standard Oil Co.*, 76 F.R.D. 490, 501 (N.D. Ill. 1977); *Saad* v. *Burns Intern. Sec. Services, Inc.*, 456 F. Supp. 33 (D.D.C.

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[5] *Curtis* v. *Loether, supra*, allows jury trials in actions brought under Title VIII of the Civil Rights Act of 1968. Many other statutory remedies have been held to afford the right to jury trial for legal claims. *See Curtis* v. *Loether, supra*, 415 U.S. at 193. Also, we note that actions framed under 42 U.S.C. § 1983 can afford the jury trial right. *See Hildebrand* v. *Board of Trustees*, 607 F.2d 705 (6th Cir. 1979); *Duchesne* v. *Sugarman*, 566 F.2d 817 (2d Cir. 1977); and *Drone* v. *Hutto*, 565 F.2d 543 (8th Cir. 1977).

1978); *Miller* v. *Doctors General Hospital,* 76 F.R.D. 136 (D. Okla. 1977); *Tucker* v. *Harley Davidson Motor Co., supra,* 454 F. Supp. at 744; *Marshall* v. *Electric Hose & Rubber Co.,* 413 F. Supp. 633, 666-68 (D. Del. 1976); *but compare Blum* v. *Gulf Oil Corp.,* 597 F.2d 936, 938 (5th Cir. 1979); *and Baker* v. *City of Detroit,* 458 F. Supp. 379, 384 (E.D. Mich. 1978). We agree with appellant that the district court erred in not granting a jury trial in an action based on § 1981 on all legal claims.

Having concluded that appellant is entitled to a jury trial on all of his legal claims, we are next confronted with appellant's argument that backpay should properly be characterized as a legal damage and thus be an issue for the jury. The question of the proper characterization of backpay arises here in the unusual context of a plaintiff who is not also seeking the equitable remedy of reinstatement. *See Lynch* v. *Pan American World Airways,* 475 F.2d 764, 765 (5th Cir. 1973); *Booker* v. *Electrical Workers Union, Local 2021 IBEW (AFL-CIO),* 431 F. Supp. 1035, 1036-37 (D. Okla. 1077); *Flores* v. *Local 25 International Brotherhood of Electrical Workers, AFL-CIO,* 407 F. Supp. 218, 220 (E.D.N.Y. 1976); *see also Donoghue* v. *Behler,* 429 F. Supp. 403, 406 (D.N.J. 1977). Basically, it seems that two rationales have supported the characterization of backpay as an equitable remedy in employment discrimination cases. First, many courts have concluded that backpay is incidental to the much broader equitable remedy of reinstatement, *see Lynch* v. *Pan American World Airways, supra.* And second, various courts have analogized backpay to the equitable doctrine of restitution. *See, e.g., Robinson* v. *Lorillard Corp.,* 444 F.2d 791, 802 (4th Cir. 1971), *cert. dismissed,* 404 U.S. 1006 (1972); *Equal Employment Opportunity Commission* v. *Detroit Edison Co.,* 515 F.2d 301, 308 (6th Cir. 1975), *vacated on other grounds,* 431 U.S. 951 (1977); *Harkless* v. *Sweeney Independent School District,* 427 F.2d 319, 324 (5th Cir. 1970); and *Demkowicz* v. *Endry,* 411 F. Supp. 1184, 1191 (S.D. Ohio

1975). After a careful examination, we find both rationales to be of questionable merit in an action brought pursuant to § 1981.[6]

The courts that have included backpay as an adjunct equitable remedy to reinstatement have analogized claims brought under § 1981 to Title VII claims, where there is seeming unanimity of judicial thinking interpreting that statute as providing solely equitable relief.[7] *See Johnson* v. *Georgia Highway Express, Inc.*, 417 F.2d 1122, 1125 (5th Cir. 1975); *Harmon* v. *May Broadcasting Co.*, 583 F.2d 410 (8th Cir. 1978); *Slack* v. *Havens*, 522 F.2d 1091, 1094 (9th Cir. 1975); *see also Hildebrand* v. *Board of Trustees of Michigan State University*, 607 F.2d 705 (6th Cir. 1975); and Comment, *Developments - Title VII*, 84 HARV. L. REV. 1109, 1265-66 (1971). While Congress apparently intended only court granted relief in Title VII, *see Curtis* v. *Loether, supra*, 415 U.S. at 197; *Lorillard* v. *Pons*,

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[6]There is a third possible rationale for characterizing backpay as equitable. The Supreme Court has reasoned that because awards of backpay under Title VII are discretionary, then such awards are equitable in nature. *See Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 442-43 (1975) (Rehnquist, J., concurring). This rationale does not transfer into the § 1981 arena because § 1981 contains none of the discretionary language contained in Title VII. Further, as Justice Rehnquist noted, the Supreme Court's cutback on the discretion the district judges have to award backpay in Title VII actions renders such awards more in the nature of legal damages. *Albemarle Paper Co.* v. *Moody, supra.*

[7]Nevertheless, some commentators have criticized the characterization of backpay as equitable in Title VII actions. *See* Redish, *Seventh Amendment Right to Jury Trial: A Study in the Irrationality of Rational Decision Making*, 70 NW. U. L. REV. 486, 526-30 (1975); Comment, *Developments - Section 1981*, 15 HARV. CIV. RIGHTS - CIV. LIB. L. REV. 29, 250 (1980). Interestingly, the Supreme Court has expressly left the jury trial right an open question in Title VII actions. *See Lorillard* v. *Pons*, 434 U.S. 575, 583-84 (1978); and *Curtis* v. *Loether, supra*, 415 U.S. at 196-97 (1974).

supra, 434 U.S. at 584-85, no such limitation is apparent under § 1981. *See Johnson* v. *Railway Express Agency, supra,* 421 U.S. at 459-60. Further, the judicial analysis that has construed backpay as incidental to reinstatement appears to be the theoretical equivalent of the repudiated "clean-up doctrine" in equity. *See Dairy Queen* v. *Wood,* 369 U.S. 469 (1962); *Ross* v. *Bernhard,* 396 U.S. 531 (1970); and James & Hazard, CIVIL PROCEDURE, Ch. 8 (2d ed. 1977).[8]

Implicit within the analysis used by courts holding that backpay should be awarded as an incident to reinstatement is the recognition that backpay is somehow dissimilar to traditional equitable remedies. Some courts have attempted to liken backpay to a form of restitution in order to characterize backpay as equitable. *See Equal Employment Opportunity Commission* v. *Detroit Edison Co., supra; Robinson* v. *Lorillard Corp., supra;* and *Demkowicz* v. *Endry, supra.* Such characterization appears to us to misconceive the concept of restitution.[9] In essence, restitution seeks to return to an injured party that which a wrongdoer has taken away. *See RESTATEMENT, RESTITUTION,* § 1-2 (1937); *Samuel* v. *University of Pittsburgh,* 375 F. Supp. 1119, 1135 (W.D. Pa. 1974); *Newco Land Co.* v. *Martin,* 213 S.W.2d 504, 510 (Mo. 1948); *Savage-*

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[8]As the Supreme Court noted in *Ross* v. *Bernhard:*

> . . . [W]here equitable and legal claims are joined in the same action, there is a right to jury trial on the legal claims which must not be infringed by either trying the legal issues as incidental to the equitable ones or by a court trial of a common issue existing between the claims.

396 U.S. at 537-38.

[9]Indeed, restitution is suited both to actions at law and in equity depending upon the nature of the rights sought to be vindicated. *See Bernstein* v. *Universal Pictures, Inc.,* 79 F.R.D. 59, 67 (S.D.N.Y. 1978); and *Polstorff* v. *Fletcher,* 430 F. Supp. 592, 595 (N.D. Ala. 1977).

Scofield Co. v. *City of Tacoma, et al.*, 105 P. 1032 (Wash. 1909). In many instances of § 1981 discrimination in an employment context, the injured party has not conferred any benefit on the alleged wrongdoer that would warrant a restitutionary recovery for backpay. This is certainly true, as here, in a case of wrongful refusal to hire. But, it is also true in many situations of unlawful firings and unlawful failures to promote. *See* Comment, *Developments - Section 1981, supra,* 15 HARV. CIV. RIGHTS — CIV. LIB. L. REV. at 250.

In our view, the remedy of backpay in § 1981 cases is more appropriately characterized as a compensatory, legal damage. A number of district courts already have adopted this view. *See Santos* v. *Mt. Sinai Hospital, supra; Partin* v. *St. Johnsbury Co., Inc.*, 447 F. Supp. 1297, 1303 n.6 (D.R.I. 1978); *Devore* v. *Edgefield County School District,* 68 F.R.D. 423, 427 (D.S.C. 1975).[10] We conclude that backpay or lost wage determinations are inherently in the nature of legal damages.[11] The calculations necessary to determine the hours of lost work stemming from a

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[10]And other courts (even though sitting in equity) have recognized the validity of characterizing backpay awards as a type of compensatory damage in § 1981 actions. *See Faraca* v. *Clements,* 506 F.2d 956, 959-60 (5th Cir. 1975); and *Smith* v. *Board of Education of Morrilton School District No. 32,* 365 F.2d 770, 784 (8th Cir. 1966).

[11]We note that in other contexts courts have construed backpay as a compensatory or legal damage as opposed to a form of equitable relief. *See Paxman* v. *Campbell,* 612 F.2d 848, 857-58 (4th Cir. 1980) (§ 1983 action); *Wehr* v. *Burroughs Corp.*, 438 F. Supp. 1052, 1056-58 (E.D. Pa. 1977) and *Pons* v. *Lorillard,* 549 F.2d 950, 954 (4th Cir. 1977), *aff'd., Lorillard* v. *Pons, supra,* 434 U.S. at 582-85 (age discrimination actions). As well, we observe that in many common law actions involving employment relationships and otherwise, juries have traditionally been called upon to compute lost wages or backpay as a measure of legal damage. *See Sampson* v. *Mo. Pac. R. Co.*, 560 S.W.2d 573, 587-89 (Mo. en banc 1978); *Sanders* v. *H. & S. Motor Freight, Inc.*, 526 S.W.2d 332, 336-37 (Mo. App. 1975); and *Effinger* v. *Bank of St. Louis,* 467 S.W.2d 291, 297 (Mo. App. 1971) (negligence actions).

§ 1981 violation are straight forward damage computations certainly within the practical capabilities of juries. *See, e.g., Pons* v. *Lorillard, supra,* 549 F.2d at 954.[12] In sum, we hold that the district court erred in denying appellant's demand for jury trial on all of his legal claims including his claim for backpay.

In anticipation of the foregoing conclusion, appellees argued that the evidence presented at trial failed to develop a submissible case.[13] After a very careful review of the entire record in this case, it is apparent that there was a marked degree of conflicting evidence that should appropriately be assessed by a jury. As such, we are satisfied that it is not possible to conclude as a matter of law that the appellees failed to produce a submissible case on the issues of liability of damages.[14] *See generally Atlantic & Gulf Stevedores, Inc.* v. *Ellerman Lines, Ltd.,* 369 U.S. 355, 360 (1962); and *Madrid* v. *Mine Safety Appliance Co.,* 486 F.2d 856 (10th Cir. 1973).

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[12]While appellees did not raise the usual policy objections to the use of jury trials, *i.e.,* delay and possible prejudice, we observe that the validity of these policy objections has been seriously challenged. The Supreme Court recognized in *Curtis* v. *Loether, supra,* 415 U.S. at 198, that any prejudice reflected in jury action can be easily corrected through the trial judge's power to direct a verdict, grant judgment notwithstanding the verdict or a new trial. Also, as one commentator has discovered, plaintiffs and defendants appear to move for jury trial in § 1981 actions with nearly equal frequency. *See* Comment, *Developments - Section 1981, supra,* 15 HARV. CIV. RIGHTS - CIV. LIB. L. REV. at 255. Further, the objection regarding delay has been found to be of unsound merit, *id.* at 254-56, especially in light of the constitutional considerations. *Curtis* v. *Loether, supra,* 415 U.S. at 198.

[13]This was the major focus of appellees' oral argument.

[14] In their brief, appellees asserted that we should accept the fact findings of the district court and affirm under the clearly erroneous standard of review. As we have already concluded that the district court erred in not granting a jury trial, appellees' argument is inapposite as the fact finding duty should have properly been a jury function.

II.

We are next confronted with appellees' difficult argument that even if they had engaged in discriminatory practices regarding appellant, they did so "lawfully" insofar as they were attempting to comply with a governmentally encouraged affirmative action plan.[11] Essentially, appellees contend that their reliance on their affirmative action plan adopted pursuant to Executive Order 11246 constitutes an absolute bar to a cause of action under § 1981 by a white individual for alleged racial discrimination. Appellant argues that when he applied for employment with appellees he was told, in effect, that if he were black he would have been hired. As such, appellant's position is that appellees' "but for" conduct states a violation of § 1981 and appellant should be able to proceed with an action for money damages.

The threshold issue that we must determine is whether appellant has arguably stated a cause of action under § 1981 based on his allegations. The Supreme Court has grappled with the concept of "reverse discrimination" in a number of recent decisions. *See Franks* v. *Bowman Transportation Co.*, 424 U.S. 747 (1976); *University of California Regents* v. *Bakke*, 438 U.S. 265 (1978); *United Steelworkers of America* v. *Keber*, 443 U.S. 193 (1979); *Fullilove* v. *Klutznick*, ____ U.S. ____, 48 U.S.L.W. 4979 (1980). The entire history of judicial analysis in this troubling area has been checkered. *See* Boyd, *Affirmative Action in Employment - The Weber Decision*, 66 IOWA L. REV. 1 (1980); and *United States* v. *City of Miami, Fla.*, 614 F.2d 1322,

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[11]Appellees submit that at the time of appellant's first rejection for employment, they were under intense pressure from the Justice Department and a United States Government Contract Compliance Officer to employ more minority drivers.

1337 (5th Cir. 1980).[16] Nevertheless, the Supreme Court in *Weber* has indicated that no absolute bars may be erected that completely preclude the advancement of white individuals. *United Steelworkers of America* v. *Weber, supra,* 443 U.S. at 208; *see also University of California Regents* v. *Bakke, supra;* and *Moseley* v. *Goodyear Tire & Rubber Co.,* 612 F.2d 187, 191 (5th Cir. 1980). We believe that under appellant's version of the facts in this action there is established a cause of action under § 1981. Assuming appellant was told that but for his race a job would have been available to him,[17] then appellees have created an absolute preclusion of whites from consideration for employment. Appellees' argument that reliance on their affirmative action program gives them, in essence, a license to discriminate on racial grounds cannot be accepted. We refuse to agree that the institution of an affirmative action plan absolutely sanctions racial discrimination.[18] While we agree that the government as

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[16]We note the Supreme Court's own reluctance to adopt clear lines in reviewing the legal sufficiency of affirmative action plans:

> We need not today define in detail the line of demarcation between permissible and impermissible affirmative action plans. It suffices to hold that the challenged Kaiser-USWA affirmative action plan falls on the permissible side of the line.

United Steelworkers of America v. *Weber, supra,* 443 U.S. at 208. *Also see generally* Justice Rehnquist's dissent in *Weber,* 443 U.S. at 219-255.

[17]In so assuming, we express no opinion on the factual controversy over what appellant was or was not told during his meetings with appellees in connection with his application for employment.

[18]Although writing in a constitutional context, we note the views of Justice Powell in *Bakke:*

> In summary, it is evident that the Davis special admissions program involves the use of an explicit racial classification never before countenanced by this Court. It tells applicants who are not Negro, Asian, or Chicano that they are totally excluded from a specific percentage of the seats in an entering class. No

well as private employers have an interest in promoting the substantial societal goal of advancing the concept of affirmative action, we do not agree that an employer solely on the basis of race can refuse to even consider the application of a white individual. Such a practice, in our view, creates the type of absolute bar or preclusion forbidden by the Supreme Court.

This determination in light of the damage action nature of this case leads us into the uncharted area of the relief available to appellant. Given that the Supreme Court has seemingly approved certain voluntary affirmative action programs that address racial imbalances in actions seeking injunctive relief, *see United Steelworkers of America* v. *Weber, supra,*[19] there are still unresolved questions regarding the nature of the legal relief, if any, that a white employee or applicant who is subjected to an illegal implementation of an affirmative action plan is entitled.

> matter how strong their qualifications, quantitative and extracurricular, including their own potential for contribution to educational diversity, they are never afforded the chance to compete with applicants from the preferred groups for the special admissions seats. At the same time, the preferred applicants have the opportunity to compete for every seat in the class.
>
> The fatal flaw in petitioner's preferential program is its disregard of individual rights . . .

438 U.S. at 319-20.

[19]Various courts have suggested that injunctive relief is inappropriate because it could thwart the legitimate goals of an employer's affirmative action plan. *See Detroit Police Officers' Ass'n.* v. *Young,* 608 F.2d 671 (6th Cir. 1979); *Carter* v. *Gallagher,* 452 F.2d 315 (8th Cir. 1972), *cert. denied,* 406 U.S. 950 (1972); *AcAleer* v. *American Tel. & Tel. Co.,* 416 F. Supp. 435 (D.D.C. 1976); *German* v. *Kipp,* 429 F. Supp. 435 (W.D. Mo. 1977), *vacated as moot,* 572 F.2d 1258 (8th Cir. 1978); *see also Franks* v. *Bowman Transportation Co., supra.*

In this appeal we are presented with a claim exclusively for money damages. The Supreme Court in *Franks* v. *Bowman Transportation Co., supra,* left unanswered the question of whether an employee who is adversely affected by an affirmative action plan has a cause of action for money damages. Chief Justice Burger, while concurring in part and dissenting in part, noted that

> . . . competitive-type seniority relief at the expense of wholly innocent employees can rarely, if ever, be equitable if that term retains traditional meaning. More equitable would be a monetary award to the person suffering the discrimination . . . . Such monetary relief would serve the dual purpose of deterring wrongdoing by the employer or union - or both - as well as protecting the rights of innocent employees. *Id.* at 780-81; *see also* the majority opinion at 777 n.38.

And, Justice Powell observed that

> [t]he second, and in my view controlling distinction between these types of relief is the impact on other workers. As noted above, the granting of backpay and of benefit-type seniority furthers the prophylactic and make whole objectives of the statute without penalizing other workers. But competitive seniority benefits, as the term implies, directly implicates the rights and expectations of perfectly innocent employees. The economic benefits awarded discrimination victims would be derived not at the expense of the employer but at the expense of other workers. Putting it differently, those disadvantaged - sometimes to the extent of losing their jobs entirely - are not the wrongdoers who have no claim to the Chancellor's conscience, but rather are innocent third parties.

Id. 424 U.S. at 788. *See also* Justice Powell's views in *University of California Regents* v. *Bakke,* 438 U.S. 265, 310 (1978).

Appellant argues that without a cause of action for money damages, he would bear the burden for correcting appellees' past history of discrimination that prompted the necessity for appellees' affirmative action plan. Thus, appellant submits that the appellees would remedy their past abuses during the interim period required to fulfill the goals of their affirmative action program at the appellant's expense. We agree that the proper allocation of the burden for rectifying past discrimination should be placed upon wrongdoing employers instead of innocent employees or applicants.[20]

A number of courts have already recognized the utility of the monetary damage remedy outlined in *Franks*. *See Myers* v. *Gilman Paper Corp.*, 544 F.2d 837, 859 (5th Cir. 1977); *Kizer* v. *Webster*, 492 F. Supp. 1135, 1149-50 (D.D.C. 1980); *Harmon* v. *San Diego City*, 477 F. Supp. 1084, 1092 (S.D. Cal. 1979); *McAleer* v. *American Tel. & Tel. Co., supra*, 416 F. Supp. at 439-40; *German* v. *Kipp, supra*, 429 F. Supp. at 1338, n.25; and *see* Note, 26 DEPAUL L. REV. 158 (1976); and Stern, *Retroactive Seniority as a Remedy for Title VII Violations: Relief To Newly Hired and Incumbent Employees in Light of Franks v. Bowman*, 22 LOYOLA L. REV. 923 (1976). Similarly, in an ac-

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[20] We are generally in agreement with Judge Gesell's opinion in *McAleer* v. *American Tel. & Tel. Co., supra:*

> Apparently common to the various opinions in *Franks* was a recognition of the need to share among the respective parties the burden of eradicating past discrimination and achieving equality of employment opportunities. In particular, it was agreed that courts should attempt to protect innocent employees by placing this burden on the wrongdoing employer whenever possible . . . . This Court, agreeing with these sentiments, sees no reason why in equitably distributing the burden among the concerned parties the onus should be shifted from the employers responsible for the discrimination to the blameless third party employee any more than is, as a practical matter, unavoidable.

416 F. Supp. at 440.

tion for money damages, we are persuaded that an alleged violation of § 1981 cannot be obviated by simple reliance upon an affirmative action plan. Therefore, we hold that appellees' efforts to insitute an affirmative action plan do not bar appellant as a matter of law from seeking a monetary award from the jury for his legal claims.

Our conclusion is tempered with the recognition that allowing a white plaintiff a cause of action for money damages in an appropriate case places employers who are implementing affirmative action plans in potentially awkward positions. *See Telephone Wkrs.* v. *New Jersey Bell Tel. Co.*, 450 F. Supp. 284, 298 (D.N.J. 1977). Nevertheless, to conclude as appellees argue, that an employer who is attempting to implement an affirmative action plan is immune from suit under § 1981 would present a situation of fundamental unfairness. For instance, it is possible that an employer could be implementing an invalid plan, or even if valid, the employer could misapply it in a given situation. To deny any cause of action to a white individual merely because his employer or prospective employer asserts the existence of an affirmative action plan could create the potential for abuse by employers.

Having concluded that appellant is not absolutely barred from asserting his legal claims under § 1981, we must now clarify the relationship between appellants' cause of action and appellees' efforts to institute their affirmative action policies. In our view, appellees' alleged reliance upon their affirmative action plan creates factual questions for the jury both on the issues of bona fide nature of the plan as well as on the proper implementation of the plan to appellant's application for employment.[21] Thus, appellees' affirmative action plan should be treated as in the nature of an affirmative defense to a charge

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[21] Appellees contended in their brief and at trial that they had implemented a valid affirmative action program and disputed appellant's allegations that he had been told that he was not hired because of his race.

of racial dicrimination under § 1981. To establish such a defense, the appellees will be required to produce evidence on the components of their affirmative action plan that will support an instruction for the jury regarding the requisite elements of a valid affirmative action plan. *See generally University of California Regents* v. *Bakke, supra; United Steelworkers of America* v. *Weber, supra; Franks* v. *Bowman Transportation Co., supra,* 424 U.S. at 772-73; *Detroit Police Officers' Ass'n.* v. *Young, supra,* 608 F.2d at 696; *Moseley* v. *Goodyear Tire & Rubber Co.,* 612 F.2d at 191; *Legal Aid Society of Alameda City* v. *Brennan,* 608 F.2d 1319, 1343 (5th Cir. 1979); *E.E.O.C.* v. *Contour Chair Lounge Co.,* 596 F.2d 809, 814 (8th Cir. 1979). As a second step, appellees will be required to show that their decision not to hire appellant was based upon a proper implementation of a legitimate affirmative action plan in accordance with its provisions. In this manner, appellees will be able to bring forth evidence of their efforts to institute and effectuate a valid affirmative action plan as well as their desire to advance the desired social goals and objectives of their affirmative action program. In sum, the factual basis of appellees' defense of an affirmative action plan must be thoroughly tested before the appellees can be entitled to an instruction that will establish the defense of a legitimate, properly applied affirmative action plan to a set of factual allegations that would in the absence of such a plan produce a submissible cause of action under § 1981.

We realize that this appeal posits the difficult problem of reverse discrimination in the context of appellant's Seventh Amendment right to a jury trial. Nevertheless, we believe that the foregoing accommodation between the stongly competing interests presented in this appeal will allow for a full airing of this controversy. Appellant will not be prevented from attempting to establish the elements of a § 1981 cause of action and the appellees will be able to attempt to demonstrate the defense of a proper application of valid affirmative action policies to appellant's application for employment. We are per-

suaded that this procedure will afford the parties the fairest framework in which to present their case to the jury.

III.

Lastly, appellees argued that there is no cause of action for the retaliation appellant alleges under § 1981.[22] Appellees' theory is essentially in two parts. First, appellees contend that there may be no racial connection between an applicant's complaint to the EEOC and the alleged retaliation. Second, appellees contend that the sole avenue to redress retaliation charges in an employment context is Section 704(a) of Title VII. Appellees reason that to allow a claim of retaliation against employers pursuant to § 1981 would subvert the procedural mechanisms established within Title VII to address retaliatory claims.

We do not accept appellees' contention that a retaliatory action against a prospective employee for attempting to enforce rights under § 1981 might not be based on *any* racial discrimination. While it is conceivable that an applicant could incorrectly believe that he or she was the victim of racial discrimination prompting the filing of a complaint, a retaliatory response by an employer against such an applicant who genuinely believed in the merits of his or her complaint would inherently be in the nature of a racial situation. *See Winston* v. *Lear-Siegler, Inc.*, 558 F.2d 1266 (6th Cir. 1977). Judicial recognition of appellees' distinction could lead courts into the factual mire of determining whether a retaliatory act was based purely on non-racial criteria. In any event, to deny appellant a cause of action for retaliatory acts resulting from pursuing a claim under § 1981

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[22] It appears that the district court concluded that there is a cause of action for retaliation under § 1981, but held against appellant on the issue. *See* Memorandum Opinion, filed January 7, 1981; and Memorandum, filed November 8, 1977.

would have the effect of giving "impetus to the perpetuation of racial discrimination." *Garcia* v. *Rush-Presbyterian-St. Luke's Medical Center,* 80 F.R.D. 254, 266 (N.D. Ill. 1978); *accord, Winston* v. *Lear-Siegler, Inc., supra; Ragheb* v. *Blue Cross & Blue Shield of Michigan,* 467 F. Supp. 94, 95-6 (E.D. Mich. 1979); *Fralin & Waldron, Inc.* v. *County of Henrico, Va.,* 474 F. Supp. 1315, 1322 (E.D. Va. 1979); *Liotta* v. *National Forge Co.,* 473 F. Supp. 1139, 1145-46 (W.D. Pa. 1979); *McClain* v. *Mack Trucks, Inc.,* 81 F.R.D. 730, 733 (E.D. Pa. 1979); *National Organization for Women* v. *Sperry Rand Corp.,* 457 F. Supp. 1338, 1346 (D. Conn. 1978); *Strozier* v. *General Motors,* 442 F. Supp. 475 (N.D. Ga. 1975), *appeal dismissed,* 584 F.2d 755, 480 (5th Cir. 1978); and *see generally DesVergnes* v. *Sukonk Water Dist.,* 601 F.2d 9 (1st Cir. 1979); *DeMatteis* v. *Eastman Kodak Co.,* 511 F.2d 306 (2d Cir. 1975); *Windsor* v. *Bethesda General Hospital,* 523 F.2d 891 (8th Cir. 1975); and *Cubas* v. *Rapid Am. Corp., Inc.,* 420 F. Supp. 663 (E.D. Pa. 1976).

Appellees rely heavily on the recent Supreme Court decision in *Great American S. & L. Assn.* v. *Novotny,* 442 U.S. 366 (1979), for their argument that the sole remedy for retaliation claims in a race discrimination conflict is Title VII. *Novotny* held that the rights created by Title VII could not be asserted through 42 U.S.C. § 1985(c). The Supreme Court reasoned that since § 1985(c) created no substantive rights and is merely a remedial provision, to allow a claim under § 1985(c) based upon a right created by Title VII would allow a complainant to avoid "most if not all of [the] detailed and specific provisions of [Title VII]. *Id.* at 375-76. Similarly, appellee argues that because appellant apparently failed to file his claim for retaliation with the EEOC in a timely fashion, pursuit of a § 1981 retaliation claim at this juncture would thwart the procedural mechanisms of Title VII. We do not agree.

Section 1981 creates substantive rights of its own that are redressable quite apart from Title VII. *See Johnson* v. *Railway*

Express Agency, supra, 421 U.S. at 457-61; and *Liotta* v. *National Forge Co., supra,* 473 F. Supp. at 1146. The Supreme Court in *Novotny* recognized this distinction in reviewing the effect of "contemporary legislation" on the 19th century Civil Rights Acts. ". . . [W]e held that the passage of Title VII did not work an implied repeal of the substantive rights to contract conferred by the same 19th century statute and now codified at 42 U.S.C. § 1981." *Great American S. & L. Assn.* v. *Novotny, supra,* 442 U.S. at 377 (*citing Johnson* v. *Railway Express Agency, supra).* As Title VII and § 1981 involve two independent causes of action, the procedures that are a part of Title VII enforcement do not affect the ability of appellant to proceed with his § 1981 claims.

Therefore, we hold that a § 1981 cause of action encompasses appellant's allegations of retaliatory conduct by the appellees following the filing of appellant's claim for racial discrimination with the EEOC.

For the foregoing reasons, the judgment of the district court is reversed and this cause is remanded to the district court for a jury trial not inconsistent with this opinion.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

United States Court of Appeals
For The Eighth Circuit

No. 80-1100

Chester W. Setser,
Appellant,

v.

Novack Investment Company, f/k/a Western Trucking Company and Alvin S. Novack,
Appellees.

On Petition for Rehearing En Banc.

Submitted: May 19, 1981
Filed: July 21, 1981

Before LAY, Chief Judge, HEANEY, BRIGHT, ROSS, STEPHENSON, HENLEY, and ARNOLD, Circuit Judges, EN BANC.*

LAY, Chief Judge.

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* Although Judge McMillian did not sit during oral argument, he has participated on the basis of the briefs and approves the opinion.

We rehear a portion of this case en banc in order to reconsider important questions regarding the permissibility under 42 U.S.C. § 1981 of race-conscious affirmative action plans designed to remedy racial imbalance in a private employer's work force. The en banc court did not review the panel's opinion of January 26, 1981, in respect to parts I and III, *Setser* v. *Novack Investment Co.*, 638 F.2d 1137, 1139-43, 1146-47 (8th Cir. 1981). Part II, *id.* at 1143-46, of the original opinion is ordered vacated and the judgment amended to reflect our en banc holding.

On rehearing we address the following issues: (1) whether section 1981 prohibits all race-conscious affirmative action; (2) whether the standards for reviewing affirmative action under title VII govern the review of such plans under section 1981; (3) what are the plaintiff's and defendant's burdens of persuasion and producing evidence in a case where the employer asserts the treatment of plaintiff was pursuant to an affirmative action plan.

The Lagality of Affirmative Action Programs under Section 1981.

In *McDonald* v. *Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976), the Supreme Court held that section 1981 prohibits discrimination against whites, but did not reach the issue of whether the section prohibited all affirmative action. *Id.* at 281 n.8. Read broadly, *McDonald* may suggest that all preferential treatment on the basis of race is impermissible.[1] Such a broad reading, however, would be unwarranted in view of subsequent

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[1] The Court stated that the statute "proscribe[s] discrimination in the making or enforcement of contracts against, or in favor of, any race." 427 U.S. at 295. *See also United Steelworkers* v. *Weber*, 443 U.S. 193, 219, 220 (1979) (Rehnquist, J., dissenting).

decisions, where seven members of the present Court have sustained affirmative action in other circumstances.[2]

Underlying the Civil Rights legislation of the 1860s and 1960s is the judgment that a just and harmonious society requires the eradication of racial discrimination. The progress in eliminating racial barriers in employment has been slow. The eloquent separate opinion of Justice Marshall in *University of California Regents* v. *Bakke,* 438 U.S. 265 (1978), chronicles our Nation's record of discrimination. *Id.* at 387-96. Many obstacles to achieving equal employment opportunities remain, as do many traditionally segregated job categories. The Nation's early perception in the school segregation cases taught us these obstacles are unlikely to be overcome merely by the prohibition of present and future discrimination.[3] As Justice Blackmun observed in *Bakke,* "In order to get beyond racism, we must first take account of race. There is no other way." *Id.* at 407. *See also Fullilove* v. *Klutznick,* 448 U.S. 448, 522 (1980) (Marshall, J., concurring). With regard to title VII, Justice Brennan stated in *United Steelworkers* v. *Weber,* 443 U.S. 193 (1979):

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[2] *Fullilove* v. *Klutznick,* 448 U.S. 448 (1980) (opinion of Burger, C.J., White and Powell, JJ.; opinion of Powell, J., concurring; opinion of Marshall, Brennan, and Blackmun, JJ., concurring); *United Steelworkers* v. *Weber,* 443 U.S. 193 (1979) (opinion of Brennan, Stewart, White, Marshall, and Blackmun, JJ.,); *University of California Regents* v. *Bakke,* 438 U.S. 265 (1980) (opinion of Powell, J., opinion of Brennan, White, Marshall, and Blackmun, JJ.,). Justice Rehnquist did not approve affirmative action remedies in any of these three cases; Justices Stevens and Powell did not participate in *Weber.* Justice Stevens dissented in *Fullilove.*

[3] In 1977 the United States Commission on Civil Rights observed:

> The short history of affirmative action programs has shown such programs to be promising instruments in obtaining equality of opportunity. Many thousands of people have been afforded opportunities to develop their talents fully—opportunities that would not have been available without affirmative action. The emerging cadre of able minority and women lawyers, doctors,

> It would be ironic indeed if a law triggered by a Nation's concern over centuries of racial injustice and intended to improve the lot of those who had "been excluded from the American dream for so long," 110 Cong. Rec. 6552 (1964) (remarks of Sen. Humphrey), constituted the first legislative prohibition of all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy.

Id. at 204.

It would indeed be more ironic if the Civil Rights Act of 1866 was used now to prohibit the only effective remedy for past discriminatory employement practices against blacks and other minorities, when the Act was virtually useless to prevent the occurrence of such discrimination for more than a century. On this basis, several other federal courts have upheld affirmative

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> construction workers, and office managers is testimony to the fact that when opportunities are provided they will be used to the fullest.
>
> While the effort often poses hard choices, courts and public agencies have shown themselves to be sensitive to the need to protect the legitimate interests and expectations of white workers and students and the interests of employers and universities in preserving systems based on merit. While all problems have not been resolved, the means are at hand to create employment and education systems that are fair to all people.
>
> It would be a tragedy if this nation repeated the error that was made a century ago. If we do not lose our nerve and commitment and if we call upon the reservoir of good will that exists in this nation, affirmative action programs will help us to reach the day when our society is truly colorblind and nonsexist because all people will have an equal opportunity to develop their full potential and to share in the effort and the rewards that such development brings.

United States Comm. on Civil Rights, Statement on Affirmative Action, 12 (1977).

action plans against section 1981 challenges since *Weber. Local 35* v. *City of Hartford,* 625 F.2d 416, 425 (2d Cir. 1980); *United States* v. *City of Miami, Florida,* 614 F.2d 1322, 1326, *rehearing granted,* 625 F.2d 1310 (5th Cir. 1980); *Detroit Police Officers' Ass'n* v. *Young,* 608 F.2d 671, 691-92 (6th Cir. 1979), *pet. for cert. filed,* 48 U.S.L.W. 3466 (Jan. 10, 1980) (No. 79-1080); *Baker* v. *City of Detroit,* 483 F. Supp. 930, 980 (E.D. Mich. 1979). We conclude that the Supreme Court, by approving race-conscious affirmative action by employers in *Weber,* implicitly approved the use of race-conscious plans to remedy past discrimination under section 1981. To open the door for such plans under title VII and close it under section 1981 would make little sense. The prohibition under section 1981 of affirmative action plans permissible under title VII would bar a remedy Congress left within the discretion of private employers when it passed title VII. *Weber,* 443 U.S. at 207. Such a result "would augment the powers of the Federal Government and diminsh traditional management prerogatives while at the same time impeding attainment of the ultimate statutory goals." *Id.*

The Supreme Court recognized in *Weber* that defining the standard for determining permissible racially preferential action by private employers is a more difficult task.[4] We are mindful that "[i]n fashioning a substantive body of law under section 1981 the courts should, in an effort to avoid undesirable substantive law conflicts, look to the principles of law created under title VII for direction."[5] This directive is all the more im-

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[4] Whether constituional standards for affirmative action differ from title VII standards is a question we need not reach in this case. *Compare Fullilove,* 448 U.S. 448, *and Bakke,* 438 U.S. 265, *with Weber,* 443 U.S. 193. Under both the Constitution and title VII, two questions are of central importance: (1) when is it permissible to initiate an affirmative action plan, and (2) what methods may be employed to prefer one race over another.

[5] *Patterson* v. *American Tobacco Co.,* 535 F.2d 257, 270 (4th Cir.), *cert. denied,* 429 U.S. 920 (1976), *remand aff'd in part, rev'd in part* 586 F.2d 300 (4th Cir. 1978), *later appeal,* 634 F.2d 744 (4th Cir.

portant for determining standards for affirmative action. Divergent standards under the two statutes would render

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1980), *pet. for cert. filed* 49 U.S.L.W. 3533 (Jan. 16, 1981) (No. 80-1199), *quoting Waters* v. *Wisconsin Steel Works of International Harvester Co.*, 502 F.2d 1309, 1316 (7th Cir. 1974), *cert. denied*, 425 U.S. 997 (1976).

For the most part, title VII and section 1981 have similar requirements and remedies. *Markey* v. *Tenneco Oil Co.*, 635 F.2d 497, 498 n.1 (5th Cir. 1981); *Whiting* v. *Jackson State Univ.*, 616 F.2d 116, 121 (5th Cir. 1980). Section 1981 affords no greater substantive protection than title VII against employment discrimination, *New York City Transit Auth.* v. *Beazer*, 440 U.S. 568, 583 n.24 (1979), and in some respects may afford less. *Compare Guardians Ass'n* v. *Civil Serv.*, 633 F.2d 232, 263-68 (2d Cir. 1980) *with Davis* v. *County of Los Angeles*, 566 F.2d 1334 (9th Cir. 1977), *vacated as moot*, 440 U.S. 625 (1979), with regard to the question of whether a showing of disporportionate impact is sufficient to make a prime facie case under section 1981. Bona fide seniority systems appear to receive the same substantive protection under both title VII and section 1981, but the question may be open to some doubt. *Compare Pettway* v. *American Cast Iron Pipe Co.*, 576 F.2d 1157, 1191 n. 37 (5th Cir. 1978). *cert. denied*, 439 U.S. 1115 (1979); *Johnson* v. *Ryder Truck Lines, Inc.*, 575 F.2d 471 (4th Cir. 1978), *cert. denied*, 440 U.S. 979 (1979) *with Bolden* v. *Pennsylvania State Police*, 578 F.2d 912, 920-21 (3d Cir. 1978).

In *Person* v. *J. S. Alberici Constr. Co.*, 640 F.2d 916 (8th Cir. 1981), a panel of this court recognized that "the principles on the order and allocation of proof [under title VII] . . . are applicable to an action brought under 42 U.S.C. § 1981." *Id.* at 918. *Accord Hudson* v. *International Business Machines Corp.*, 620 F.2d 351, 354 (2d Cir.), *cert. denied*, 101 S.Ct. 794 (1980); *Flowers* v. *Crouch-Walker Corp.*, 552 F.2d 1277 (7th Cir. 1977); *Sabol* v. *Snyder*, 524 F.2d 1009 (10th Cir. 1975); *Long* v. *Ford Motor Co.*, 496 F.2d 500 (6th Cir. 1974).

For similar remedies under the two statutes *see McCormick* v. *Attala County Bd. of Ed.*, 541 F.2d 1094, 1095 (5th Cir. 1976); *see generally Johnson* v. *Railway Express Agy., Inc.*, 421 U.S. 454, 459-61 (1975); *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 47 & n.7 (1974).

The statutes are not identical, however. For example, on the question of the right to a jury when a party seeks back pay under seciton 1981, the panel's decision in this case distinguishes the practice under title VII. 638 F.2d at 1141-42; *Contra Moore* v. *Sun Oil Co.*, 636 F.2d 154, 156-57 (6th Cir. 1980).

employers unable to remedy some past discriminatory practices, even though the practices were in violation of title VII. Consequently, some effects of employment segregation would be "locked-in." *Id.* at 215 (Blackmun, J., concurring). Moreover, by equating the affirmative action standards of title VII with those of section 1981, we obviate the employer's risk of inconsistent obligations. Private employers already face a dilemma: they risk termination of federal benefits and liability for past discrimination against blacks, for failing to institute an affirmative action plan, and they face liability to whites for any voluntary preferences adopted to remedy past discrimination. If section 1981 prohibited what title VII permitted with respect to racially preferential remedies, the private employer's ability to conform its conduct to federal discrimination statutes would become more complicated and uncertain than it already is.

Prima Facie Case of Reverse Discrimination.

The proof required to establish a prima facie case of discrimination will necessarily vary in different factual situations. *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792, 802 n.13 (1973); *Person* v. *J. S. Alberici Construction Co.,* 640 F.2d 916, 918 (8th Cir. 1981). "A prima facie case under *McDonnell Douglas* raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors." *Furnco Construction Corp.* v. *Waters,* 438 U.S. 567, 577 (1978). *Weber* holds, however, that consideration of race is a permissible factor when that consideration is designed to remedy a "conspicuous racial imbalance in traditionally segregated job categories." 443 U.S. at 209. Consequently, in a reverse discrimination case, where the evidence shows that plaintiff's treatment by the employer was pursuant to a bona fide affirmative action plan, the satisfaction of the four part *McDonnell* test will not necessarily show a prima facie violation. This must follow because a race-conscious choice by reason of a remedial

affirmative action plan is legitimate under title VII or section 1981.

The first burden on the employer in a reverse discrimination suit is to produce some evidence that its affirmative action program was a response to a conspicuous racial imbalance in its work force and is remedial. Some indication that the employer has identified a racial imbalance in its work force is necessary to ensure that new forms of invidious discrimination are not approved in the guise of remedial affirmative action. There is no fixed formula for the type or nature of the evidence sufficient to meet the employer's burden. A showing of a conspicuous racial imbalance by statistics is sufficient, even if the statistics employed would not be sufficient to show a prima facie violation of title VII.[6] Evidence that the employer implemented its plan in response to findings of a racially imbalanced work force by a federal or state agency or in adherence to a court order, whether entered by consent or after contested litigation, would be sufficient to meet the employer's burden of producing some evidence of a remedial purpose. The employer's internal investigation and analysis of its work force which results in a conclusion of a racially imbalanced work force would satisfy the employer's burden. This list of ways to meet the employer's burden of producing some evidence of a remedial purpose is merely suggestive, not exhaustive, of appropriate methods.

The second burden on the employer in a reverse discrimination suit is to produce some evidence that its affirmative action plan is reasonably related to the plan's remedial purpose. The goals and timetables for the program should be reasonably related to such considerations as the racial imbalance of the work force, the availability of qualified applicants, and the

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[6] "[T]he freedom of an employer to undertake race-conscious affirmative action efforts [does not] depend [] on whether or not his effort is motivated by fear of liability under Title VII." 443 U.S. at 208 n.8.

number of employment opportunities available.[7] *Weber* tells us that a plan must "not unnecessarily trammel the interests of the white employees." 443 U.S. at 208. The specifics of the plan approved in *Weber* indicate some guidelines for private affirmative action plans.

The *Weber* plan did "not result in the discharge of white workers and their replacement with new black hires." *Id.* at 208. Other courts have also recognized this characteristic as an indicia of a permissible plan. *Local 35* v. *City of Hartford,* 625 F.2d 416, 425 (2d Cir. 1980); *United States* v. *City of Miami, Fla.,* 614 F.2d 1322, 1339 (5th Cir. 1980); *United States* v. *City of Alexandria,* 614 F.2d 1358, 1366 (5th Cir. 1980); *McLaughlin* v. *Great Lakes Dredge & Dock Co.,* 495 F. Supp. 857 (N.D.

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[7] As the EEOC Guidelines set forth:

> (i) The plan should be tailored to solve the problems which were identified in the self analysis, see § 1608.4(a), *supra,* and to ensure that employement systems operate fairly in the future, while avoiding unnecessary restrictions on opportunities for the workforce as a whole. The race, sex, and national origin conscious provisions of the plan or program should be maintained only so long as is necessary to achieve these objectives.
>
> (ii) Goals and timetables should be reasonably related to such considerations as the effects of past discrimination, the need for prompt elimination of adverse impact or disparate treatment, the availability of basically qualified or qualifiable applicants, and the number of employment opportunities expected to be available.

29 C.F.R. § 1608.4(c)(2)(i) and (ii).

> However, the absence of a written self analysis and a written affirmative action plan or program may make it more difficult to provide credible evidence that the analysis was conducted, and that action was taken pursuant to a plan or program based on the analysis. Therefore, the Commission recommends that such analyses and plans be in writing.

Id. at § 1608.4(d)(2).

Ohio 1980); *Baker* v. *City of Detroit*, 483 F. Supp. 930, 983-86 (E.D. Mich. 1979); *Tangren* v. *Wackenhut Services, Inc.*, 480 F. Supp. 539 (D. Nev. 1979).

Also, the *Weber* plan did not create "an absolute bar to the advancement of white employees." 443 U.S. at 208. In *Weber*, the plan reserved "for black employees 50% of the openings in an in-plant craft-training program until the percentage of black craftworkers in the plan [was] commensurate with the percentage of blacks in the local labor force." *Id* at 197. Finally, the *Weber* plan was characterized as a temporary measure. *Id.* at 208. A plan should be used no longer than reasonably necessary to eliminate a conspicuous racial imbalance.

Once an employer has produced evidence that its treatment of the plaintiff was a direct consequence of its implementation of a bona fide affirmative action plan, the employer is entitled to a judgment as a matter of law unless the plaintiff shows that the purpose of the employer's affirmative action program is not remedial. *Texas Department of Community Affairs* v. *Burdine*, 101 S.Ct. 1089, 1094-95 (1981). To raise a genuine issue of material fact, and avoid summary judgment, a plaintiff in a reverse discrimination case must present evidence that would show that (1) some reason other than a remedial reason motivated the employer when implementing the plan or (2) the plan adopted unreasonably exceeds its remedial purpose. One method of raising an issue as to whether the employer's purpose was remeidal would be to show that the plan was adopted in the absence of a racial imbalance in the employer's work force. In the absence of evidence which would show that the employer's interest was not remedial or that the plan's goals are unreasonably excessive in light of the plan's remedial purpose, summary judgment is warranted.[8]

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[8] Our decision is not inconsistent with *Parker* v. *Baltimore & O. R.R.*, 25 F.E.P. Cases 889 (D.C. Cir. 1981), wherein the trial court awarded an employer summary judgment on grounds that the

If the plaintiff presents evidence that the affirmative action plan is unreasonable or irremedial, the court shall weight the evidence and determine whether the plan is bona fide. The issue of the validity of an affirmative action plan is one for the court and not the jury. There is no bright line distinction between permissible and impermissible affirmative action plans. A flexible evaluation of the particular method adopted is appropriate. Private employers face loss of substantial federal contracts and liability to minorities, if they refuse to initiate affirmative action as a remedy for past discrimination, and they face liability to whites for any voluntary preferences accorded minorities. In light of their dilemma, and out of respect for traditional management prerogatives, 443 U.S. at 207, we are reluctant to discourage experimentation by employers in remedying past discrimination. *Fullilove,* 448 U.S. at 491. An employer's plan is a bona fide one if it is reasonably related to its remedial purpose. *Fullilove,* 448 U.S. at 487, 510; *Local 35,* 625 F.2d at 423-25; *Miami,* 614 F.2d at 1338-40; *Detroit Police Officers',* 608 F.2d at 696.

If the court finds the plan has a remedial purpose and reasonable goals, the employer is entitled to summary judgment, unless there is a genuine issue as to whether the treatment of the plaintiff was related to the plan. For example, Setser claims that Novack Investment Co. rejected him on two separate occasions for employment, once in October 1973 and again in November 1973. Setser admits that Novack rejected him in October 1973 because of its affirmative action plan. On remand, if the court finds the plan to be bona fide, Novack is

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employer was implementing an affirmative action program. The Court of Appeals reversed because the affirmative action documents were not part of the record and could not have explained all the employer's promotional decisions in any case. *Id.* at 892.

entitled to judgment on the October claim.[9] If the court finds the plan is not bona fide, Novack is still entitled to present any other defense it might have to the jury, including its allegation that Setser was rejected in October as an unreliable employee. The jury shall determine the reason for Setser's rejection. If the jury finds that Setser was rejected in October because of a legitimate, nondiscriminatory reason, Novack is entitled to judgment, regardless whether its plan is bona fide or not.

With respect to Setser's claim that he was rejected in November 1973 (1) because of Novack's affirmative action plan or (2) in retaliation for filing an EEOC claim, the roles of the court and the jury follow the same pattern. The court will determine whether the affirmative action plan is bona fide or not. The jury shall determine whether the reason for rejecting Setser was (1) the plan, (2) retaliation, or (3) some legitimate, nondiscriminatory reason. If the court rules the plan is bona fide, Setser is entitled to judgment only if the jury finds that Novack retaliated against him. If the court rules the plan is not bona fide, Novack is entitled to judgment only if the jury finds that some legitimate, nondiscriminatory reason explains Setser's rejection.

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[9] Once the court finds the plan to be bona fide under a reverse discrimination claim filed under section 1981 there is nothing further for the jury to pass on. Plaintiff cannot make a claim that his rejection under an affirmative action plan is pretextual since any other alleged reason for his rejection would not be based upon a race-conscious choice and therefore would defeat his claim of racial discrimination under section 1981. Sex and age discrimination claims are not actionable under section 1981. In contrast, under a title VII claim if the plaintiff claims discrimination because of age or sex and the employer asserts as a defense the implementation of an affirmative action plan the issue of a pretextual reason would present an issue of fact for the trier of fact (the court). *Cf. Hunter* v. *St. Louis-San Francisco Ry.*, 639 F.2d 424 (8th Cir. 1981).

We remand this case to the district court for consideration of the employer's affirmative action plan in accordance with this opinion.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 77-489 C (1)

Chester W. Setser,
Plaintiff,

v.

Novack Investment Company, d/b/a Budig Western
Trucking and Alvin S. Novack,
Defendants.

ORDER
(Filed January 7, 1980)

In accordance with the Memorandum of this Court filed this date and incorporated herein,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that defendants have judgment against plaintiff on plaintiff's complaint; and

IT IS FURTHER ORDERED that the costs of this action be taxed against the plaintiff.

Dated this 7th day of January, 1980.

/s/ H. Kenneth Wangelin
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 77-489 C (1)

Chester W. Setser,
Plaintiff,

v.

Novack Investment Company, d/b/a Budig Western
Trucking and Alvin S. Novack,
Defendants.

MEMORANDUM
(Filed January 7, 1980)

The above entitled action is brought pursuant to 42 U.S.C. §1981 wherein plaintiff, a white male, alleges that defendants denied him employment as an over-the-road truck driver in October of 1973 and November of 1973 on account of his race and because he protested the denial of employment as unlawful discrimination. The matter is presently before the court for a decision on the merits following a bench trial.

After consideration of the testimony adduced at trial, the exhibits introduced into evidence, the briefs of the parties and the applicable law, the Court hereby makes and enters the following findings of fact and conclusions of law. Any finding of fact equally applicable as a conclusion of law applicable as a finding of fact is adopted as such.

Findings of Fact

1. Plaintiff Chester W. Setser, a white male, has been a professional over-the-road driver and a member of the Teamsters

Union since 1960. Plaintiff was initially employed by defendant Western Trucking Company for a six month period in the latter half of 1968.

2. Defendant Novack Investment Company is a Missouri corporation organized in December, 1947, which at the time of its organization operated under the name of Western Trucking Company. Defendant Alvin S. Novack was the chief operating officer of Western. Western Trucking Company was engaged in the business of a common carrier, pursuant to authority granted from the Interstate Commerce Commission and having an over-the-road operation and a city delivery and pickup operation in the City of St. Louis, Missouri. Said corporation continued in such business until August 2, 1976, when it sold to Budig Western Trucking Company its operating rights and its motor vehicle rolling stock. Since August 2, 1976, Western Trucking Company has not engaged in the trucking business and has not had any business reason to hire any city truck driver or any over-the-road truck driver.

3. As set forth in finding 1, *supra,* plaintiff was initially employed by defendant in 1968. During such employment defendant found plaintiff to be an unsatisfactory employee for the reasons that it had been difficult to get in touch with plaintiff to notify him of his work as assigned, and once left a loaded tractor-trailer in St. Louis overnight.

4. The expeditious transport of out-bound freight requires over-the-road drivers to be available to receive work assignments when called. When an over-the-road driver could not be reached to transport a particular shipment, the company was required to call other regular over-the-road drivers in accordance with their seniority in the presence of a union member. Thus, those instances where a driver could not be reached or would call in and "book-off" at the last minute caused the defendant company great inconvenience.

5. In January and February of 1972 and in September and October of 1973, plaintiff was used occasionally by defendant company as a casual driver. Despite their previous experience with the plaintiff, defendant was still willing to take the risk with plaintiff for casual work for the reason that if a casual driver did not show up for a scheduled run all the company had to do was call any other casual driver irrespective of their seniority, and the calls did not have to be made with a union steward present.

6. Defendant corporation did not allow plaintiff to work sufficient days as a casual driver to obtain seniority according to the union contract, for the reason that plaintiff was not considered by the company to be a satisfactory regular employee.

7. During the period of time that plaintiff worked as a casual driver, defendant hired two full-time employees, both white males, as drivers.

8. The company would not, under any circumstances, have hired plaintiff as a regular employee due to the difficulties it had had with plaintiff through the years.

9. Plaintiff applied to defendants for employment in October, 1973, but did not apply for a position as a regular over-the-road driver. In this regard, the Court finds probative the fact that plaintiff was not sent to the Motor Carrier's Council of St. Louis for a screening test as was the procedure with all applicants that defendant company deemed to be suitable, prospective, regular employees. Defendant would not have hired plaintiff for such position due to its prior experiences with plaintiff.

10. In October of 1973 defendants did not refuse to hire plaintiff on account of his race.

11. Plaintiff was not told in October, 1973 that defendant could not hire him because the company had to hire black employees, nor was he told that he would be hired after the three black drivers who were transferring into over-the-road positions.

12. In November, 1973 plaintiff was not refused employment on account of plaintiff's charge to the Equal Employment Opportunity Commission alleging racial discrimination nor did plaintiff reapply for a position as a regular over-the-road driver with defendant company. Furthermore, plaintiff did not even call in to the company for casual work subsequent to November, 1973. This fact is somewhat incredible in light of plaintiff's amended November 9, 1976 E.E.O.C. charge.

13. In October, 1973, at the time of plaintiff's application, there were no over-the-road driving positions available. Defendant company had previously promised three black individuals who had requested to be transferred from the city seniority roster to over-the-road positions that they would be transferred to over-the-road positions as they became available.

14. When those three individuals decided to return to the city board, the company subsequently hired, between November 9, 1973 and March 6, 1974, five white individuals as over-the-road drivers. The additional positions became available due to an increased work load.

15. A substantial amount of defendants' revenue was from government business. With respect to companies that were doing government business there was in effect at all times relevant herein Presidential Executive Order No. 11246. The Executive Order in no way required defendant company to have any quotas or to hire persons that were not qualified or to prefer any minorities over more qualified whites, but it did require preference to be given to equally qualified blacks in new hiring,

promotions or transfers from within. Defendant company was contacted on numerous occasions by government contract compliance examiners who repeatedly told defendant that it was not in compliance and that penalties, including loss of all government business and prohibiting any other company that was engaged in government business from doing any business with defendant, could be imposed. Said examiners specifically told defendant that it must obtain blacks in its over-the-road driver category. In addition they specifically instructed defendant that equally qualified blacks were to be preferred over white.

16. With respect to defendant Alvin S. Novack the Court finds that said defendant did not harbor any ill will or malice towards plaintiff, did not refuse to hire plaintiff on account of his race, and at all times herein pertinent acted as an agent of Western Trucking Company and Novack Investment Company in good faith towards plaintiff.

17. At no time did defendant corporations harbor any ill will or malice towards plaintiff nor did defendant corporations refuse to hire plaintiff on account of his race. At all times pertinent defendant corporations acted in good faith towards plaintiff.

Conclusions of Law

This Court has jurisdiction over the parties herein and has subject matter jurisdiction pursuant to 28 U.S.C. §1343. Neither defendant Western Trucking Company, defendant Novack Investment Company nor defendant Alvin S. Novack discriminated against plaintiff on account of his race. Furthermore, neither defendant Western Trucking Company, defendant Novack Investment Company nor defendant Alvin S. Novack failed to hire plaintiff in retaliation for the charge he had filed with the Equal Employment Opportunity Commis-

sion. Plaintiff's claim concerning the charge and the alleged retaliation is but one instance of the connivance and misstatement which make his own testimony incredible and unworthy of belief. Having found no acts of discrimination on retaliation on the part of defendants the Court will direct entry of judgment in favor of defendants on plaintiff's complaint.

Dated this 7th day of January, 1980.

/s/ H. Kenneth Wangelin
United States District Judge

Opposition

Office - Supreme Court, U.S.
FILED
OCT 16 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-646

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

NOVACK INVESTMENT COMPANY f/k/a
WESTERN TRUCKING COMPANY and ALVIN S. NOVACK,
Petitioners,

vs.

CHESTER W. SETSER,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals
For the Eighth Circuit

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QUESTIONS PRESENTED FOR REVIEW

I. Whether The Court Of Appeals Erred In Construing 42 U.S.C. 1981 To Prohibit Discrimination In The Form Of Retaliation Against Persons Who Protest Racial Discrimination By Filing Charges Of Racial Discrimination With The Equal Employment Opportunity Commission.

II. Whether The Court Of Appeals Erred In Construing The Seventh Amendment To The United States Constitution To Require Jury Trials On Legal Claims Brought Under 42 U.S.C. 1981.

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
Table of Contents	iii
Table of Authorities	iii
Citation to Opinion Below	1
Jurisdictional Statement	1
Constitutional Provision and Statutes Involved	2
Statement of Case	3
Summary of Argument	5
Argument	6
Conclusion	11
Appendix	A-1

TABLE OF AUTHORITIES

Constitutional Provision Cited

The Seventh Amendment, United States Constitution	2,5

Cases Cited

Curtis v. Loether, 415 U.S. 189 (1974)	8,11
Dairy Queen v. Wood, 369 U.S. 469 (1962)	11
DeMatteis v. Eastman Kodak Co., 511 F.2d 306 (2nd Cir. 1975)	6

DesVergnes v. Sukonk Water Dist., 601 F.2d 9 (1st Cir. 1979) 6

Farala v. Clements, 506 F.2d 956 (5th Cir. 1975), *cert. den'd.* 422 U.S. 1006 (1975) 6

Fiedler v. Marumsco Christian School, 631 F.2d 1144 (4th Cir. 1980) 6

Grant v. Bethlehem Steel Corp., 622 F.2d 43 (2nd Cir. 1980) 7

Hildebrand v. Board of Trustees of Mich. State Univ., 607 F.2d 705 (6th Cir. 1979) 10

Hudson v. International Business Machines Corp., et al., 620 F.2d 351 (2nd Cir.), *cert. den'd.*, 101 S.Ct. 794 (1980) 7

Johnson v. Railway Express Agency, 421 U.S. 454 (1975) 6,7,8

Johnson v. Sea Drilling Corporation, 486 F.Supp. 462 (E.D. La. 1980) 9

London v. Coopers and Lybrand, 644 F.2d 811 (9th Cir. 1981) (Rehearing and rehearing *En Banc* Den'd.) .. 6

Lorillard v. Pons, 434 U.S. 545 (1978) 8

Lynch v. Pan American World Airways, 475 F.2d 764 (5th Cir. 1973) 8,9

Moore v. Sun Oil Company of Pennsylvania, 636 F.2d 154 (6th Cir. 1980) 8,10

Page v. Schlumberger Wells, ____ F.Supp. ____, (D.S.D. Tx., June 6, 1980) [23 E.P.D. ¶31, 104] 9

Ross v. Bernhard, 396 U.S. 531 (1970) 8

Sullivan v. Little Hunting Park, 396 U.S. 229 (1969) ... 6

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Statutes Cited

28 U.S.C. §1254(1) 2

28 U.S.C. §1343 3

42 U.S.C. §1981 2,3,4,5,6,7,8,9,10,11

42 U.S.C. §1982 6

42 U.S.C. §2000e-3(a).....2,5,6,7

No. 81-646

IN THE

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WESTERN TRUCKING COMPANY and ALVIN S. NOVACK,
Petitioners,

vs.

CHESTER W. SETSER,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals
For the Eighth Circuit

CITATION TO OPINION BELOW

The opinion of the three judge panel of the Eighth Circuit Court of Appeals containing that Court's decision relating to the issues raised herein by Petitioner is reported at 638 F.2d 1137 (8th Cir. 1981). A copy of that Opinion is printed in Appendix A hereto, *infra.*

JURISDICTIONAL STATEMENT

Petitioners seek to review the decision of the United States Court of Appeals for the Eighth Circuit issued on January 26, 1981. Subsequent to that date Petitioners filed a Motion for

Rehearing before the Court *En Banc* which was granted with respect to certain issues not challenged herein by Petitioner. The Eighth Circuit Court of Appeals *En Banc* rendered its Opinion and Judgment on July 21, 1981. Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

1. The Seventh Amendment, United States Constitution, provides as follows:

> In Suits at common law, where the value in controversy shall exceed Twenty Dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of common law.

2. 42 U.S.C. 1981 provides as follows:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

3. 42 U.S.C. 2000e-3(a), Section 704(a) Title VII of the Civil Rights Act of 1964 as amended, provides as follows:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any in-

dividual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice (made an unlawful employment practice) by this title, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title.

STATEMENT OF CASE

Respondent Chester W. Setser is a white male, 50 years old, who has been employed through his adult life as a professional truck driver. Respondent Setser alleged below that he sought employment as a truck driver with the Petitioners' trucking company during the Fall of 1973 and was denied same by Petitioner, through its chief executive officer, Petitioner Alvin S. Novack, initially because of race and later because he protested the initial refusal to employ him as constituting unlawful racial discrimination.

In or about August, 1976 Petitioner changed its name from Western Trucking Company to Novack Investment Company, withdrew from the transportation business, and since has been engaged primarily in the business of investing in real estate, securities and the like. Petitioner Novack Investment Company has had no jobs available for truck drivers after August, 1976.

Suit was initiated in May, 1977. Respondent Setser's Complaint sought only monetary damages. Specifically, he sought back pay, lost insurance benefits, expenses incurred in seeking alternative employment, inconvenience, humiliation and embarrassment, pain and suffering, punitive damages, interest, attorneys' fees and costs.

Respondent brought his suit under 42 U.S.C. 1981 and invoked the jurisdiciton of the district court under 28 U.S.C. 1343. Respondent filed a timely request for a jury trial on all legal issues.

Petitioners in the district court challenged Respondent's right to a jury trial only with respect to lost wages, interest, attorneys' fees and costs. On November 8, 1977 the district court entered an Order striking Respondent's demand for a jury trial in all respects.

The case was tried to the court on July 17, 18 and 19, 1978. At trial, Respondent Setser testified he spoke with Petitioner Alvin S. Novack in October, 1973, asked for employment, and was told that the company was "in a bind with the colored situation," that the company realized it needed drivers but was going to hire black over-the-road drivers before employing any additional whites, but after hiring black drivers it would hire Mr. Setser. Respondent Setser further testified that he went to the Equal Employment Opportunity Commission (EEOC) in response to his conversation with Petitioner Novack, where he filed a Charge of Discrimination claiming he had been refused the opportunity to become an employee because of his race.

EEOC sent a "Notice of Charge of Employment Discrimination" to the Petitioner company on November 8, 1973.

Respondent Setser testified he returned to the Petitioners' facility in mid-November, 1973 to talk with Petitioner Novack. Respondent Setser testified that Petitioner Novack advised that he was aware of the charges filed with EEOC and would not now hire Respondent Setser under any circumstances.

On January 7, 1980 the District Court dismissed Respondent's Complaint and a timely appeal was taken to the Eighth Circuit Court of Appeals.

A three judge panel for the United States Court of Appeals for the Eighth Circuit rendered its decision on January 26, 1981 holding, in relevant part, that Respondent Setser was entitled to a jury trial and that his claim of retaliation was actionable under 42 U.S.C. 1981.

SUMMARY OF ARGUMENT

The Court of Appeals properly held that 42 U.S.C. 1981 is independent of 42 U.S.C. 2000e-3(a) and permits a cause of action for retaliation against one who pursues a claim of racial discrimination. The Court's holding that the Seventh Amendment requires a jury trial of legal claims in an action under 42 U.S.C. 1981 was compelled by prior decisions of this Court. Both holdings are in accordance with propositions settled by this Court and do not conflict with applicable decisions by other Courts of Appeals in a manner sufficient to warrant review by this Court at this time.

ARGUMENT

A. Retaliation

The Court of Appeals' decision regarding retaliation is predicated on the proposition that a retaliatory response by an employer against one who files charges of racial discrimination, genuinely believing he was subjected to unlawful discrimination, reflects a situation inherently racial in nature, and, therefore, to permit a cause of action under 42 U.S.C. 1981 would promote the elimination of unlawful racial discrimination. Conversely, the Court below recognized that to deny Respondent a cause of action for Petitioners' retaliatory actions resulting from the pursuit of a claim of racial discrimination would have the predictable effect of giving "impetus to the perpetuation of racial discrimination." Accord, *London* v. *Coopers and Lybrand,* 644 F.2d 811 (9th Cir. 1981) (Rehearing and Rehearing *En Banc* Den'd.); *Winston* v. *Lear-Siegler, Inc.,* 558 F.2d 1266 (6th Cir. 1977); and see generally, *Fiedler* v. *Marumsco Christian School,* 631 F.2d 1144 (4th Cir. 1980); *DesVergnes* v. *Sukonk Water Dist.,* 601 F.2d 9 (1st Cir. 1979); *DeMatteis* v. *Eastman Kodak Co.,* 511 F.2d 306 (2nd Cir. 1975); *Farala* v. *Clements,* 506 F.2d 956 (5th Cir. 1975), *cert. den'd.* 422 U.S. 1006 (1975).

The decision of the Court of Appeals below is wholly consistant with the holding in *Sullivan* v. *Little Hunting Park,* 396 U.S. 229 (1969) where this Court allowed a suit under 42 U.S.C. 1982 by a white property owner who was expelled from a residential community organization because he assigned his interest in real property to a black person.

The Court of Appeals below dismissed Petitoners' argument that Title VII's prohibition against retaliation (42 U.S.C. 2000e-3(a)) constitutes the Respondent's exclusive remedy for retaliation. The Court's disposition of Petitioners' position is proper in light of this Court's holding in *Johnson* v. *Railway*

Express Agency, 421 U.S. 454 (1975) that "the remedies available under Title VII and under §1981, although related, and although directed to most of the same ends, are separate, distinct, and independent," *Johnson* v. *Railway Express Agency, supra,* 421 U.S. at 461.

Petitioners mistakenly rely on *Hudson* v. *International Business Machines Corp., et al.,* 620 F.2d 351 (2nd Cir.), *cert. den'd.,* 101 S.Ct. 794 (1980) and *Grant* v. *Bethlehem Steel Corp.,* 622 F.2d 43 (2nd Cir. 1980) to generate a supposed conflict between the instant decision of the Court of Appeals and prior decisions of the Court of Appeals for the Second Circuit. A cursory examination of Petitioners' cases shows there is no true conflict.

Grant v. *Bethlehem Steel Corp., supra,* was initiated by three black iron workers who were employed by the defendant company and were members of the defendant union. The plaintiffs initiated action in the district court against both defendants alleging racial discrimination and retaliation under 42 U.S.C. 2000e, *et seq.* and §1981. The district court disposed of the case on the basis of the claims brought under 42 U.S.C. 2000e; the court entered judgment against the defendant union and for the plaintiffs. The Court did not provide any relief under the §1981 claims. The plaintiffs did not appeal. *Grant* v. *Bethlehem Steel Corp., supra,* 622 F.2d at 45 n. 1. The defendant union appealed, but did not raise any issue relating to 42 U.S.C. 1981. The question of retaliation under §1981, therefore, was not before the Court of Appeals for the Second Circuit.

In *Hudson* v. *International Business Machines Corp. et al.,* 620 F.2d 351 (2nd Cir. 1980) the Second Circuit upheld the district court's dismissal of a retaliation claim under §1981. The Court's affirmance, however, was bottomed on the plaintiff's failure in the district court to establish any acts of retaliation. *Hudson* v. *International Business Machines Corp., supra,* 620 F.2d at 356. The Second Circuit specifically declined to consider the soundness of the district court's analysis and legal conclu-

sions with respect to the availability of a claim for retaliation under 42 U.S.C. 1981. *Id.* 620 F.2d at 356.

B. Availability Of A Jury Trial

It is settled law that a jury trial is available upon a timely demand in those instances where the three considerations set out in *Ross* v. *Bernhard,* 396 U.S. 531 (1970) come together:

> . . . First, the premerger custom with reference to such question; second, the remedy sought; and third, the practical abilities and limitations of jurys. *Id.* 396 U.S. at 538.

The initial test of *Ross* v. *Bernhard, supra,* is satisified herein notwithstanding 42 U.S.C. 1981's date of enactment. *Curtis* v. *Loether,* 415 U.S. 189 (1974). The second test is satisfied because 42 U.S.C. 1981 permits recovery of legal damages, *Johnson* v. *Railway Express Agency,* 421 U.S. 454, 460 (1974), and such relief was sought herein. Satisfaction of the third test set out in *Ross* v. *Bernhard. supra,* cannot reasonably be contested in light of this Court's determinations in *Lorillard* v. *Pons,* 434 U.S. 545 (1978) (jury trials available in cases of age discrimination) and *Curtis* v. *Loether, supra* (jury trials available in cases of housing discrimination). The Court of Appeals below properly relied on these established authorities in ruling that Respondent Setser had a constitutional right to a jury trial on his legal claims. Accord, *Moore* v. *Sun Oil Company of Pennsylvania,* 636 F.2d 154 (6th Cir. 1980).

Petitioner cites this Court to *Lynch* v. *Pan American World Airways,* 475 F.2d 764 (5th Cir. 1973) saying that this decision is in "direct conflict" with the Eighth Circuit's holding that jury trials are available in actions under 42 U.S.C. 1981. Again, however, the Petitioners are mistaken for the two decisions are clearly distinguishable.

The situation in *Lynch* v. *Pan American World Airways, supra,* is factually different from that presented by Respondent

Setser. Mr. Setser did not seek reinstatement; indeed, because the Petitioner company had changed the nature of its business, reinstatement was not possible. In contrast, the plaintiff in *Lynch* v. *Pan American World Airways, supra,* sought back pay with reinstatement and his allegations for compensatory and punitive damages were "unsupported." *Id.* 475 F.2d at 765. Thus, the rule articulated in *Lynch* v. *Pan American World Airways, supra,* is not at odds with that expressed in the instant decision by the Eighth Circuit Court of Appeals. Even within the former Fifth Circuit, the decision in *Lynch* v. *Pan American World Airways, supra,* has not been a bar to jury trials where plaintiffs seeking lost wages and other actual damages, but not injunctive relief or reinstatement, have initiated actions under 42 U.S.C. 1981. *Johnson* v. *Sea Drilling Corporation,* 486 F.Supp. 462 (E.D. La. 1980); *Page* v. *Schlumberger Wells,* ____ F.Supp. ____, (D.S.D. Tx., June 6, 1980) [23 E.P.D. ¶ 31, 104].

The Court of Appeals below properly ruled that Respondent Setser was entitled to a jury trial on all of his legal claims, including his claim for lost wages. On the latter issue, the Court of Appeals observed that Mr. Setser was not seeking reinstatement and, inasmuch as Mr. Setser had never worked for Petitioners during the period in which he sought lost wages, there was nothing restitutionary about his claim for same to warrant the characterization of it as equitable relief. See, Comment, Developments - Section 1981, 15 HARV. CIV. RIGHTS CIV. LIB. REV. 29, 250 (1980). In this context, Respondent Setser's claim for damages in the form of wages lost due to Petitioners' alleged unlawful conduct constituted legal damages readily ascertainable by a jury as in other actions brought under common law involving an alleged unlawful disruption of the employment relationship.

It appears from the Petitioners' brief that, although not designated for review in their "Questions Presented", their real concern is with the Court of Appeal's characterization of lost

wages as a form of legal damages. This question, of course, is only incidental to the paramount issue of whether the Constitution requires a jury trial upon timely demand in an action brought under 42 U.S.C. 1981. The several Courts of Appeals may agree a jury trial is available on legal claims under §1981 and disagree as to what constitutes a legal claim, without presenting a conflict of sufficient importance to warrant review by this Court at this time.

In *Moore* v. *Sun Oil Company of Pennsylvania,* 636 F.2d 154 (6th Cir. 1980), for example, a panel of that Court of Appeals concluded that the Constitution requires a jury trial where a party seeks legal relief (i.e. compensatory or punitive damages) in an action under 42 U.S.C. 1981, but that a claim for "back pay" is equitable in nature and does not trigger the same right. *Id.* 636 F.2d at 156-157. The panel's decision in this Sixth Circuit case specifically notes that its determination regarding "back pay" was a function of the peculiar "law of [that] circuit" *Id.*[1] We may assume, therefore, the rule is subject to change by that Circuit sitting *En Banc,* without further action by this Court. As a practical matter those litigants in the Sixth Circuit who allege a legal claim (even under the restrictive rule of *Moore* v. *Sun Oil Company of Pennsylvania, supra*), and seek jury trials in 1981 actions likely will have all of their claims resolved consistent with the jury's verdict on liability in connection with the legal claims. Circuit Judge Weick, concurring in *Hildebrand* v. *Board of Trustees of Mich. State Univ.,* 607 F.2d 705, 713-14 (6th Cir. 1979), described the process in the following manner:

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[1] The Sixth Circuit panel in *Moore* v. *Sun Oil Company of Pennsylvania* apparently concluded back pay was equitable relief because of obiter dictum in an earlier decision involving 42 U.S.C. 1983 to the effect that, when the remedy sought is injunctive relief "and/or" back pay, there is no right to a jury trial. *See, Hildebrand* v. *Board of Trustees of Mich. State Univ.,* 607 F.2d 705 (6th Cir. 1979).

Under federal law, the legal claim must be tried first before a jury and the equitable claim resolved subsequently *in light of the determination of the legal claim by the jury. Dairy Queen* v. *Wood,* 369 U.S. 469, 82 S.Ct. 894, 8 L.Ed.2d 44 (1962); Wright's Federal Practice and Procedure §2305; 5 Moore's Federal Practice and Procedure, para. 38.13 at p. 144. See also *Curtis* v. *Loether,* 415 U.S. 189, 98 S.Ct. 866, 55 L.Ed.2d 40 (1974). (Emphasis added).

CONCLUSION

The Court of Appeals correctly held that a jury trial is available to litigants under 42 U.S.C. 1981 and that the same statute provides a remedy to one who is subjected to reprisals for opposing what he believes is racial discrimination. The Petitioners have failed to demonstrate the existance of special and important reasons why the writ should be granted. The instant decision does not present a conflict with applicable decisions of this Court or of another Court of Appeals on the same matter(s) sufficient to warrant review by this Court at this time.

Respectfully submitted,

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APPENDIX

APPENDIX

United States Court of Appeals
For The Eighth Circuit

No. 80-1100

Chester W. Setser,
Appellant,

v.

Novack Investment
Company d/b/a Budig
Western Trucking and
Alvin S. Novack,
Appellees.

Appeal from the United States
District Court for the Eastern
District of Missouri.

Submitted: October 13, 1980
Filed: January 26, 1981

Before STEPHENSON and HENLEY, Circuit Judges,
and HUNTER,* District Judge.

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*The Honorable Elmo B. Hunter, Chief Judge, United States District Court for the Western District of Missouri, sitting by designation.

HUNTER, District Judge.

This is an appeal from a final judgment entered below against the appellant Chester Setser and in favor of appellees Novack Investment Co. d/b/a Budig Western Trucking Co. and Alvin S. Novack.[1] For the following reasons, we reverse and remand for jury trial.

Appellant brought his action alleging only violations of 42 U.S.C. § 1981 [§ 1981].[2] Appellant, a white male, contended in the district court that he was refused employment with appellees in the fall of 1973 for the unlawful reasons of racial discrimination and retaliation by appellees after appellant filed a charge of discrimination with the Equal Employment Opportunity Commission [EEOC]. Appellant argues on appeal that the district court erred in striking his demand for jury trial and that the district court erroneously found that the appellees did not discriminate or retaliate against appellant. Appellees contend that even if they did discriminate, they did so lawfully because they were following affirmative action guidelines pursuant to

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[1]The case was tried to the district court on July 17-19, 1978, and on January 7, 1980, the district court entered its Memorandum and Order in favor of appellees.

[2]Section 1981 provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Executive Order 11246.[3] Further, appellees assert that as a matter of law retaliation is not cognizable as a cause of action under § 1981.

I.

The complaint sought only monetary damages for backpay, lost insurance benefits, expenses incurred in seeking alternative employment, inconvenience, humiliation and embarrassment, pain and suffering, punitive damages, interest, attorneys' fees and costs. The appellant moved for a jury trial and the appellees opposed such a request only for the claims seeking lost wages, interest, attorneys' fees and costs. On November 8, 1977, the district court, *sua sponte,* entered its order denying appellant's demand for jury trial on all issues. The district court's order explained the ruling by stating that "this court has consistently held that a jury trial is unavailable in § 1981 cases."

Appellant argues that there is a constitutional guarantee of the right to a jury trial under the Seventh Amendment in an action brought pursuant to § 1981 on all claims for "legal" relief.[4] Even though the Supreme Court has yet to identify specifically the parameters of the jury trial right in § 1981 actions, an

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[3]This regulation requires that as a matter of public policy, federal contractors adopt affirmative action policies to prevent discrimination against any employee or applicant for employment because of race, color, religion or national origin. *See* 3 C.F.R. § 339. Appellees were, in part, government contractors and were covered by this regulation. *See United Steelworkers of America* v. *Weber,* 443 U.S. 193, 223 n.2 (1979). For an exhaustive study of the background of Executive Order 11246, *see Contractors Ass'n. of Eastern Pa.* v. *Secretary of Labor,* 442 F.2d 159, 168-71 (3d Cir. 1971); and Comment, *Executive Order No. 11246: Presidential Power to Regulate Employment Discrimination,* 43 MO. L. REV. 451 (1978).

[4]Appellant does not contend that attorneys' fees, interest and costs should be jury issues.

analysis of various judicial authorities indicates that parties are constitutionally entitled to jury trials under § 1981 on all legal claims. The Supreme Court has definitively held that "[t]he Seventh Amendment does apply to actions enforcing statutory rights, and requires a jury trial upon demand, if the statute creates legal rights and remedies enforceable in an action for damages in ordinary courts of law." *Curtis* v. *Loether*, 415 U.S. 189, 194 (1974).[5] And, it is clearly settled that actions brought pursuant to § 1981 afford plaintiffs both legal and equitable relief. *See Johnson* v. *Railway Express Agency*, 421 U.S. 454 (1975). The legal rights available include "compensatory and, under certain circumstances, punitive damages." *Johnson* v. *Railway Express Agency, supra*, 421 U.S. at 460. *See also Johnson* v. *Ryder Truck Lines, Inc.*, 575 F.2d 471 (4th Cir. 1978); *Garner* v. *Giarrusso*, 575 F.2d 300 (5th Cir. 1978); *Mahome* v. *Waddle*, 564 F.2d 1018 (3d Cir. 1977); *McCrary* v. *Runyon*, 515 F.2d 1082 (4th Cir. 1975), *aff'd.*, 427 U.S. 160 (1976); *Tucker* v. *Harley Davidson Motor Co.*, 454 F. Supp. 738, 743 (D. Wis. 1978); *Peterson* v. *Lehigh Valley Dist. Council*, 453 F. Supp. 735 (E.D. Pa. 1978). Further, many lower courts have recognized the appropriateness of submitting all legal contentions encompassed within a § 1981 cause of action to the jury. *See Santos* v. *Mt. Sinai Hospital*, ____ F. Supp. ____ (S.D.N.Y. 1980); *Seymore* v. *Reader's Digest Ass'n., Inc.*, 493 F. Supp. 257, 267 (S.D.N.Y. 1980); *Johnson* v. *Sea Drilling Corp.*, 486 F. Supp. 462, 463-64 (E.D. La. 1980); *McCrary* v. *Standard Oil Co.*, 76 F.R.D. 490, 501 (N.D. Ill. 1977); *Saad* v. *Burns Intern. Sec. Services, Inc.*, 456 F. Supp. 33 (D.D.C.

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[5] *Curtis* v. *Loether, supra*, allows jury trials in actions brought under Title VIII of the Civil Rights Act of 1968. Many other statutory remedies have been held to afford the right to jury trial for legal claims. *See Curtis* v. *Loether, supra*, 415 U.S. at 193. Also, we note that actions framed under 42 U.S.C. § 1983 can afford the jury trial right. *See Hildebrand* v. *Board of Trustees*, 607 F.2d 705 (6th Cir. 1979); *Duchesne* v. *Sugarman*, 566 F.2d 817 (2d Cir. 1977); and *Drone* v. *Hutto*, 565 F.2d 543 (8th Cir. 1977).

1978); *Miller* v. *Doctors General Hospital,* 76 F.R.D. 136 (D. Okla. 1977); *Tucker* v. *Harley Davidson Motor Co., supra,* 454 F. Supp. at 744; *Marshall* v. *Electric Hose & Rubber Co.,* 413 F. Supp. 633, 666-68 (D. Del. 1976); *but compare Blum* v. *Gulf Oil Corp.,* 597 F.2d 936, 938 (5th Cir. 1979); *and Baker* v. *City of Detroit,* 458 F. Supp. 379, 384 (E.D. Mich. 1978). We agree with appellant that the district court erred in not granting a jury trial in an action based on § 1981 on all legal claims.

Having concluded that appellant is entitled to a jury trial on all of his legal claims, we are next confronted with appellant's argument that backpay should properly be characterized as a legal damage and thus be an issue for the jury. The question of the proper characterization of backpay arises here in the unusual context of a plaintiff who is not also seeking the equitable remedy of reinstatement. *See Lynch* v. *Pan American World Airways,* 475 F.2d 764, 765 (5th Cir. 1973); *Booker* v. *Electrical Workers Union, Local 2021 IBEW (AFL-CIO),* 431 F. Supp. 1035, 1036-37 (D. Okla. 1077); *Flores* v. *Local 25 International Brotherhood of Electrical Workers, AFL-CIO,* 407 F. Supp. 218, 220 (E.D.N.Y. 1976); *see also Donoghue* v. *Behler,* 429 F. Supp. 403, 406 (D.N.J. 1977). Basically, it seems that two rationales have supported the characterization of backpay as an equitable remedy in employment discrimination cases. First, many courts have concluded that backpay is incidental to the much broader equitable remedy of reinstatement, *see Lynch* v. *Pan American World Airways, supra.* And second, various courts have analogized backpay to the equitable doctrine of restitution. *See, e.g., Robinson* v. *Lorillard Corp.,* 444 F.2d 791, 802 (4th Cir. 1971), *cert. dismissed,* 404 U.S. 1006 (1972); *Equal Employment Opportunity Commission* v. *Detroit Edison Co.,* 515 F.2d 301, 308 (6th Cir. 1975), *vacated on other grounds,* 431 U.S. 951 (1977); *Harkless* v. *Sweeney Independent School District,* 427 F.2d 319, 324 (5th Cir. 1970); and *Demkowicz* v. *Endry,* 411 F. Supp. 1184, 1191 (S.D. Ohio

1975). After a careful examination, we find both rationales to be of questionable merit in an action brought pursuant to § 1981.[6]

The courts that have included backpay as an adjunct equitable remedy to reinstatement have analogized claims brought under § 1981 to Title VII claims, where there is seeming unanimity of judicial thinking interpreting that statute as providing solely equitable relief.[7] *See Johnson* v. *Georgia Highway Express, Inc.*, 417 F.2d 1122, 1125 (5th Cir. 1975); *Harmon* v. *May Broadcasting Co.*, 583 F.2d 410 (8th Cir. 1978); *Slack* v. *Havens*, 522 F.2d 1091, 1094 (9th Cir. 1975); *see also Hildebrand* v. *Board of Trustees of Michigan State University*, 607 F.2d 705 (6th Cir. 1975); and Comment, *Developments - Title VII*, 84 HARV. L. REV. 1109, 1265-66 (1971). While Congress apparently intended only court granted relief in Title VII, *see Curtis* v. *Loether, supra*, 415 U.S. at 197; *Lorillard* v. *Pons*,

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[6]There is a third possible rationale for characterizing backpay as equitable. The Supreme Court has reasoned that because awards of backpay under Title VII are discretionary, then such awards are equitable in nature. *See Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 442-43 (1975) (Rehnquist, J., concurring). This rationale does not transfer into the § 1981 arena because § 1981 contains none of the discretionary language contained in Title VII. Further, as Justice Rehnquist noted, the Supreme Court's cutback on the discretion the district judges have to award backpay in Title VII actions renders such awards more in the nature of legal damages. *Albemarle Paper Co.* v. *Moody, supra.*

[7]Nevertheless, some commentators have criticized the characterization of backpay as equitable in Title VII actions. *See* Redish, *Seventh Amendment Right to Jury Trial: A Study in the Irrationality of Rational Decision Making*, 70 NW. U. L. REV. 486, 526-30 (1975); Comment, *Developments - Section 1981*, 15 HARV. CIV. RIGHTS - CIV. LIB. L. REV. 29, 250 (1980). Interestingly, the Supreme Court has expressly left the jury trial right an open question in Title VII actions. *See Lorillard* v. *Pons*, 434 U.S. 575, 583-84 (1978); and *Curtis* v. *Loether, supra*, 415 U.S. at 196-97 (1974).

supra, 434 U.S. at 584-85, no such limitation is apparent under § 1981. *See Johnson* v. *Railway Express Agency, supra,* 421 U.S. at 459-60. Further, the judicial analysis that has construed backpay as incidental to reinstatement appears to be the theoretical equivalent of the repudiated "clean-up doctrine" in equity. *See Dairy Queen* v. *Wood,* 369 U.S. 469 (1962); *Ross* v. *Bernhard,* 396 U.S. 531 (1970); and James & Hazard, CIVIL PROCEDURE, Ch. 8 (2d ed. 1977).[8]

Implicit within the analysis used by courts holding that backpay should be awarded as an incident to reinstatement is the recognition that backpay is somehow dissimilar to traditional equitable remedies. Some courts have attempted to liken backpay to a form of restitution in order to characterize backpay as equitable. *See Equal Employment Opportunity Commission* v. *Detroit Edison Co., supra; Robinson* v. *Lorillard Corp., supra;* and *Demkowicz* v. *Endry, supra.* Such characterization appears to us to misconceive the concept of restitution.[9] In essence, restitution seeks to return to an injured party that which a wrongdoer has taken away. *See RESTATEMENT, RESTITUTION,* § 1-2 (1937); *Samuel* v. *University of Pittsburgh,* 375 F. Supp. 1119, 1135 (W.D. Pa. 1974); *Newco Land Co.* v. *Martin,* 213 S.W.2d 504, 510 (Mo. 1948); *Savage-*

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[8]As the Supreme Court noted in *Ross* v. *Bernhard:*

> . . . [W]here equitable and legal claims are joined in the same action, there is a right to jury trial on the legal claims which must not be infringed by either trying the legal issues as incidental to the equitable ones or by a court trial of a common issue existing between the claims.

396 U.S. at 537-38.

[9]Indeed, restitution is suited both to actions at law and in equity depending upon the nature of the rights sought to be vindicated. *See Bernstein* v. *Universal Pictures, Inc.,* 79 F.R.D. 59, 67 (S.D.N.Y. 1978); and *Polstorff* v. *Fletcher,* 430 F. Supp. 592, 595 (N.D. Ala. 1977).

Scofield Co. v. *City of Tacoma, et al.*, 105 P. 1032 (Wash. 1909). In many instances of § 1981 discrimination in an employment context, the injured party has not conferred any benefit on the alleged wrongdoer that would warrant a restitutionary recovery for backpay. This is certainly true, as here, in a case of wrongful refusal to hire. But, it is also true in many situations of unlawful firings and unlawful failures to promote. *See* Comment, *Developments - Section 1981, supra,* 15 HARV. CIV. RIGHTS — CIV. LIB. L. REV. at 250.

In our view, the remedy of backpay in § 1981 cases is more appropriately characterized as a compensatory, legal damage. A number of district courts already have adopted this view. *See Santos* v. *Mt. Sinai Hospital, supra; Partin* v. *St. Johnsbury Co., Inc.*, 447 F. Supp. 1297, 1303 n.6 (D.R.I. 1978); *Devore* v. *Edgefield County School District*, 68 F.R.D. 423, 427 (D.S.C. 1975).[10] We conclude that backpay or lost wage determinations are inherently in the nature of legal damages.[11] The calculations necessary to determine the hours of lost work stemming from a

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[10]And other courts (even though sitting in equity) have recognized the validity of characterizing backpay awards as a type of compensatory damage in § 1981 actions. *See Faraca* v. *Clements*, 506 F.2d 956, 959-60 (5th Cir. 1975); and *Smith* v. *Board of Education of Morrilton School District No. 32*, 365 F.2d 770, 784 (8th Cir. 1966).

[11]We note that in other contexts courts have construed backpay as a compensatory or legal damage as opposed to a form of equitable relief. *See Paxman* v. *Campbell*, 612 F.2d 848, 857-58 (4th Cir. 1980) (§ 1983 action); *Wehr* v. *Burroughs Corp.*, 438 F. Supp. 1052, 1056-58 (E.D. Pa. 1977) and *Pons* v. *Lorillard*, 549 F.2d 950, 954 (4th Cir. 1977), *aff'd., Lorillard* v. *Pons, supra*, 434 U.S. at 582-85 (age discrimination actions). As well, we observe that in many common law actions involving employment relationships and otherwise, juries have traditionally been called upon to compute lost wages or backpay as a measure of legal damage. *See Sampson* v. *Mo. Pac. R. Co.*, 560 S.W.2d 573, 587-89 (Mo. en banc 1978); *Sanders* v. *H. & S. Motor Freight, Inc.*, 526 S.W.2d 332, 336-37 (Mo. App. 1975); and *Effinger* v. *Bank of St. Louis*, 467 S.W.2d 291, 297 (Mo. App. 1971) (negligence actions).

§ 1981 violation are straight forward damage computations certainly within the practical capabilities of juries. *See, e.g., Pons* v. *Lorillard, supra,* 549 F.2d at 954.[12] In sum, we hold that the district court erred in denying appellant's demand for jury trial on all of his legal claims including his claim for backpay.

In anticipation of the foregoing conclusion, appellees argued that the evidence presented at trial failed to develop a submissible case.[13] After a very careful review of the entire record in this case, it is apparent that there was a marked degree of conflicting evidence that should appropriately be assessed by a jury. As such, we are satisfied that it is not possible to conclude as a matter of law that the appellees failed to produce a submissible case on the issues of liability of damages.[14] *See generally Atlantic & Gulf Stevedores, Inc.* v. *Ellerman Lines, Ltd.,* 369 U.S. 355, 360 (1962); and *Madrid* v. *Mine Safety Appliance Co.,* 486 F.2d 856 (10th Cir. 1973).

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[12]While appellees did not raise the usual policy objections to the use of jury trials, *i.e.,* delay and possible prejudice, we observe that the validity of these policy objections has been seriously challenged. The Supreme Court recognized in *Curtis* v. *Loether, supra,* 415 U.S. at 198, that any prejudice reflected in jury action can be easily corrected through the trial judge's power to direct a verdict, grant judgment notwithstanding the verdict or a new trial. Also, as one commentator has discovered, plaintiffs and defendants appear to move for jury trial in § 1981 actions with nearly equal frequency. *See* Comment, *Developments - Section 1981, supra,* 15 HARV. CIV. RIGHTS - CIV. LIB. L. REV. at 255. Further, the objection regarding delay has been found to be of unsound merit, *id.* at 254-56, especially in light of the constitutional considerations. *Curtis* v. *Loether, supra,* 415 U.S. at 198.

[13]This was the major focus of appellees' oral argument.

[14] In their brief, appellees asserted that we should accept the fact findings of the district court and affirm under the clearly erroneous standard of review. As we have already concluded that the district court erred in not granting a jury trial, appellees' argument is inapposite as the fact finding duty should have properly been a jury function.

II.

We are next confronted with appellees' difficult argument that even if they had engaged in discriminatory practices regarding appellant, they did so "lawfully" insofar as they were attempting to comply with a governmentally encouraged affirmative action plan.[11] Essentially, appellees contend that their reliance on their affirmative action plan adopted pursuant to Executive Order 11246 constitutes an absolute bar to a cause of action under § 1981 by a white individual for alleged racial discrimination. Appellant argues that when he applied for employment with appellees he was told, in effect, that if he were black he would have been hired. As such, appellant's position is that appellees' "but for" conduct states a violation of § 1981 and appellant should be able to proceed with an action for money damages.

The threshold issue that we must determine is whether appellant has arguably stated a cause of action under § 1981 based on his allegations. The Supreme Court has grappled with the concept of "reverse discrimination" in a number of recent decisions. *See Franks* v. *Bowman Transportation Co.*, 424 U.S. 747 (1976); *University of California Regents* v. *Bakke*, 438 U.S. 265 (1978); *United Steelworkers of America* v. *Keber*, 443 U.S. 193 (1979); *Fullilove* v. *Klutznick*, ___ U.S. ___, 48 U.S.L.W. 4979 (1980). The entire history of judicial analysis in this troubling area has been checkered. *See* Boyd, *Affirmative Action in Employment - The Weber Decision*, 66 IOWA L. REV. 1 (1980); and *United States* v. *City of Miami, Fla.*, 614 F.2d 1322,

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[11]Appellees submit that at the time of appellant's first rejection for employment, they were under intense pressure from the Justice Department and a United States Government Contract Compliance Officer to employ more minority drivers.

1337 (5th Cir. 1980).[16] Nevertheless, the Supreme Court in *Weber* has indicated that no absolute bars may be erected that completely preclude the advancement of white individuals. *United Steelworkers of America* v. *Weber, supra,* 443 U.S. at 208; *see also University of California Regents* v. *Bakke, supra;* and *Moseley* v. *Goodyear Tire & Rubber Co.*, 612 F.2d 187, 191 (5th Cir. 1980). We believe that under appellant's version of the facts in this action there is established a cause of action under § 1981. Assuming appellant was told that but for his race a job would have been available to him,[17] then appellees have created an absolute preclusion of whites from consideration for employment. Appellees' argument that reliance on their affirmative action program gives them, in essence, a license to discriminate on racial grounds cannot be accepted. We refuse to agree that the institution of an affirmative action plan absolutely sanctions racial discrimination.[18] While we agree that the government as

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[16]We note the Supreme Court's own reluctance to adopt clear lines in reviewing the legal sufficiency of affirmative action plans:

> We need not today define in detail the line of demarcation between permissible and impermissible affirmative action plans. It suffices to hold that the challenged Kaiser-USWA affirmative action plan falls on the permissible side of the line.

United Steelworkers of America v. *Weber, supra,* 443 U.S. at 208. *Also see generally* Justice Rehnquist's dissent in *Weber,* 443 U.S. at 219-255.

[17]In so assuming, we express no opinion on the factual controversy over what appellant was or was not told during his meetings with appellees in connection with his application for employment.

[18]Although writing in a constitutional context, we note the views of Justice Powell in *Bakke:*

> In summary, it is evident that the Davis special admissions program involves the use of an explicit racial classification never before countenanced by this Court. It tells applicants who are not Negro, Asian, or Chicano that they are totally excluded from a specific percentage of the seats in an entering class. No

well as private employers have an interest in promoting the substantial societal goal of advancing the concept of affirmative action, we do not agree that an employer solely on the basis of race can refuse to even consider the application of a white individual. Such a practice, in our view, creates the type of absolute bar or preclusion forbidden by the Supreme Court.

This determination in light of the damage action nature of this case leads us into the uncharted area of the relief available to appellant. Given that the Supreme Court has seemingly approved certain voluntary affirmative action programs that address racial imbalances in actions seeking injunctive relief, *see United Steelworkers of America* v. *Weber, supra,*[19] there are still unresolved questions regarding the nature of the legal relief, if any, that a white employee or applicant who is subjected to an illegal implementation of an affirmative action plan is entitled.

> matter how strong their qualifications, quantitative and extracurricular, including their own potential for contribution to educational diversity, they are never afforded the chance to compete with applicants from the preferred groups for the special admissions seats. At the same time, the preferred applicants have the opportunity to compete for every seat in the class.
>
> The fatal flaw in petitioner's preferential program is its disregard of individual rights . . .

438 U.S. at 319-20.

[19]Various courts have suggested that injunctive relief is inappropriate because it could thwart the legitimate goals of an employer's affirmative action plan. *See Detroit Police Officers' Ass'n.* v. *Young,* 608 F.2d 671 (6th Cir. 1979); *Carter* v. *Gallagher,* 452 F.2d 315 (8th Cir. 1972), *cert. denied,* 406 U.S. 950 (1972); *AcAleer* v. *American Tel. & Tel. Co.,* 416 F. Supp. 435 (D.D.C. 1976); *German* v. *Kipp,* 429 F. Supp. 435 (W.D. Mo. 1977), *vacated as moot,* 572 F.2d 1258 (8th Cir. 1978); *see also Franks* v. *Bowman Transportation Co., supra.*

In this appeal we are presented with a claim exclusively for money damages. The Supreme Court in *Franks* v. *Bowman Transportation Co., supra,* left unanswered the question of whether an employee who is adversely affected by an affirmative action plan has a cause of action for money damages. Chief Justice Burger, while concurring in part and dissenting in part, noted that

> . . . competitive-type seniority relief at the expense of wholly innocent employees can rarely, if ever, be equitable if that term retains traditional meaning. More equitable would be a monetary award to the person suffering the discrimination . . . . Such monetary relief would serve the dual purpose of deterring wrongdoing by the employer or union - or both - as well as protecting the rights of innocent employees. *Id.* at 780-81; *see also* the majority opinion at 777 n.38.

And, Justice Powell observed that

> [t]he second, and in my view controlling distinction between these types of relief is the impact on other workers. As noted above, the granting of backpay and of benefit-type seniority furthers the prophylactic and make whole objectives of the statute without penalizing other workers. But competitive seniority benefits, as the term implies, directly implicates the rights and expectations of perfectly innocent employees. The economic benefits awarded discrimination victims would be derived not at the expense of the employer but at the expense of other workers. Putting it differently, those disadvantaged - sometimes to the extent of losing their jobs entirely - are not the wrongdoers who have no claim to the Chancellor's conscience, but rather are innocent third parties.

Id. 424 U.S. at 788. *See also* Justice Powell's views in *University of California Regents* v. *Bakke,* 438 U.S. 265, 310 (1978).

Appellant argues that without a cause of action for money damages, he would bear the burden for correcting appellees' past history of discrimination that prompted the necessity for appellees' affirmative action plan. Thus, appellant submits that the appellees would remedy their past abuses during the interim period required to fulfill the goals of their affirmative action program at the appellant's expense. We agree that the proper allocation of the burden for rectifying past discrimination should be placed upon wrongdoing employers instead of innocent employees or applicants.[20]

A number of courts have already recognized the utility of the monetary damage remedy outlined in *Franks*. *See Myers* v. *Gilman Paper Corp.*, 544 F.2d 837, 859 (5th Cir. 1977); *Kizer* v. *Webster*, 492 F. Supp. 1135, 1149-50 (D.D.C. 1980); *Harmon* v. *San Diego City*, 477 F. Supp. 1084, 1092 (S.D. Cal. 1979); *McAleer* v. *American Tel. & Tel. Co., supra*, 416 F. Supp. at 439-40; *German* v. *Kipp, supra*, 429 F. Supp. at 1338, n.25; and *see* Note, 26 DEPAUL L. REV. 158 (1976); and Stern, *Retroactive Seniority as a Remedy for Title VII Violations: Relief To Newly Hired and Incumbent Employees in Light of Franks v. Bowman*, 22 LOYOLA L. REV. 923 (1976). Similarly, in an ac-

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[20] We are generally in agreement with Judge Gesell's opinion in *McAleer* v. *American Tel. & Tel. Co., supra:*

> Apparently common to the various opinions in *Franks* was a recognition of the need to share among the respective parties the burden of eradicating past discrimination and achieving equality of employment opportunities. In particular, it was agreed that courts should attempt to protect innocent employees by placing this burden on the wrongdoing employer whenever possible . . . . This Court, agreeing with these sentiments, sees no reason why in equitably distributing the burden among the concerned parties the onus should be shifted from the employers responsible for the discrimination to the blameless third party employee any more than is, as a practical matter, unavoidable.

416 F. Supp. at 440.

tion for money damages, we are persuaded that an alleged violation of § 1981 cannot be obviated by simple reliance upon an affirmative action plan. Therefore, we hold that appellees' efforts to insitute an affirmative action plan do not bar appellant as a matter of law from seeking a monetary award from the jury for his legal claims.

Our conclusion is tempered with the recognition that allowing a white plaintiff a cause of action for money damages in an appropriate case places employers who are implementing affirmative action plans in potentially awkward positions. *See Telephone Wkrs.* v. *New Jersey Bell Tel. Co.*, 450 F. Supp. 284, 298 (D.N.J. 1977). Nevertheless, to conclude as appellees argue, that an employer who is attempting to implement an affirmative action plan is immune from suit under § 1981 would present a situation of fundamental unfairness. For instance, it is possible that an employer could be implementing an invalid plan, or even if valid, the employer could misapply it in a given situation. To deny any cause of action to a white individual merely because his employer or prospective employer asserts the existence of an affirmative action plan could create the potential for abuse by employers.

Having concluded that appellant is not absolutely barred from asserting his legal claims under § 1981, we must now clarify the relationship between appellants' cause of action and appellees' efforts to institute their affirmative action policies. In our view, appellees' alleged reliance upon their affirmative action plan creates factual questions for the jury both on the issues of bona fide nature of the plan as well as on the proper implementation of the plan to appellant's application for employment.[21] Thus, appellees' affirmative action plan should be treated as in the nature of an affirmative defense to a charge

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[21] Appellees contended in their brief and at trial that they had implemented a valid affirmative action program and disputed appellant's allegations that he had been told that he was not hired because of his race.

of racial dicrimination under § 1981. To establish such a defense, the appellees will be required to produce evidence on the components of their affirmative action plan that will support an instruction for the jury regarding the requisite elements of a valid affirmative action plan. *See generally University of California Regents* v. *Bakke, supra; United Steelworkers of America* v. *Weber, supra; Franks* v. *Bowman Transportation Co., supra,* 424 U.S. at 772-73; *Detroit Police Officers' Ass'n.* v. *Young, supra,* 608 F.2d at 696; *Moseley* v. *Goodyear Tire & Rubber Co.,* 612 F.2d at 191; *Legal Aid Society of Alameda City* v. *Brennan,* 608 F.2d 1319, 1343 (5th Cir. 1979); *E.E.O.C.* v. *Contour Chair Lounge Co.,* 596 F.2d 809, 814 (8th Cir. 1979). As a second step, appellees will be required to show that their decision not to hire appellant was based upon a proper implementation of a legitimate affirmative action plan in accordance with its provisions. In this manner, appellees will be able to bring forth evidence of their efforts to institute and effectuate a valid affirmative action plan as well as their desire to advance the desired social goals and objectives of their affirmative action program. In sum, the factual basis of appellees' defense of an affirmative action plan must be thoroughly tested before the appellees can be entitled to an instruction that will establish the defense of a legitimate, properly applied affirmative action plan to a set of factual allegations that would in the absence of such a plan produce a submissible cause of action under § 1981.

We realize that this appeal posits the difficult problem of reverse discrimination in the context of appellant's Seventh Amendment right to a jury trial. Nevertheless, we believe that the foregoing accommodation between the stongly competing interests presented in this appeal will allow for a full airing of this controversy. Appellant will not be prevented from attempting to establish the elements of a § 1981 cause of action and the appellees will be able to attempt to demonstrate the defense of a proper application of valid affirmative action policies to appellant's application for employment. We are per-

suaded that this procedure will afford the parties the fairest framework in which to present their case to the jury.

III.

Lastly, appellees argued that there is no cause of action for the retaliation appellant alleges under § 1981.[22] Appellees' theory is essentially in two parts. First, appellees contend that there may be no racial connection between an applicant's complaint to the EEOC and the alleged retaliation. Second, appellees contend that the sole avenue to redress retaliation charges in an employment context is Section 704(a) of Title VII. Appellees reason that to allow a claim of retaliation against employers pursuant to § 1981 would subvert the procedural mechanisms established within Title VII to address retaliatory claims.

We do not accept appellees' contention that a retaliatory action against a prospective employee for attempting to enforce rights under § 1981 might not be based on *any* racial discrimination. While it is conceivable that an applicant could incorrectly believe that he or she was the victim of racial discrimination prompting the filing of a complaint, a retaliatory response by an employer against such an applicant who genuinely believed in the merits of his or her complaint would inherently be in the nature of a racial situation. *See Winston* v. *Lear-Siegler, Inc.*, 558 F.2d 1266 (6th Cir. 1977). Judicial recognition of appellees' distinction could lead courts into the factual mire of determining whether a retaliatory act was based purely on non-racial criteria. In any event, to deny appellant a cause of action for retaliatory acts resulting from pursuing a claim under § 1981

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[22] It appears that the district court concluded that there is a cause of action for retaliation under § 1981, but held against appellant on the issue. *See* Memorandum Opinion, filed January 7, 1981; and Memorandum, filed November 8, 1977.

would have the effect of giving "impetus to the perpetuation of racial discrimination." *Garcia* v. *Rush-Presbyterian-St. Luke's Medical Center,* 80 F.R.D. 254, 266 (N.D. Ill. 1978); *accord, Winston* v. *Lear-Siegler, Inc., supra; Ragheb* v. *Blue Cross & Blue Shield of Michigan,* 467 F. Supp. 94, 95-6 (E.D. Mich. 1979); *Fralin & Waldron, Inc.* v. *County of Henrico, Va.,* 474 F. Supp. 1315, 1322 (E.D. Va. 1979); *Liotta* v. *National Forge Co.,* 473 F. Supp. 1139, 1145-46 (W.D. Pa. 1979); *McClain* v. *Mack Trucks, Inc.,* 81 F.R.D. 730, 733 (E.D. Pa. 1979); *National Organization for Women* v. *Sperry Rand Corp.,* 457 F. Supp. 1338, 1346 (D. Conn. 1978); *Strozier* v. *General Motors,* 442 F. Supp. 475 (N.D. Ga. 1975), *appeal dismissed,* 584 F.2d 755, 480 (5th Cir. 1978); and *see generally DesVergnes* v. *Sukonk Water Dist.,* 601 F.2d 9 (1st Cir. 1979); *DeMatteis* v. *Eastman Kodak Co.,* 511 F.2d 306 (2d Cir. 1975); *Windsor* v. *Bethesda General Hospital,* 523 F.2d 891 (8th Cir. 1975); and *Cubas* v. *Rapid Am. Corp., Inc.,* 420 F. Supp. 663 (E.D. Pa. 1976).

Appellees rely heavily on the recent Supreme Court decision in *Great American S. & L. Assn.* v. *Novotny,* 442 U.S. 366 (1979), for their argument that the sole remedy for retaliation claims in a race discrimination conflict is Title VII. *Novotny* held that the rights created by Title VII could not be asserted through 42 U.S.C. § 1985(c). The Supreme Court reasoned that since § 1985(c) created no substantive rights and is merely a remedial provision, to allow a claim under § 1985(c) based upon a right created by Title VII would allow a complainant to avoid "most if not all of [the] detailed and specific provisions of [Title VII]. *Id.* at 375-76. Similarly, appellee argues that because appellant apparently failed to file his claim for retaliation with the EEOC in a timely fashion, pursuit of a § 1981 retaliation claim at this juncture would thwart the procedural mechanisms of Title VII. We do not agree.

Section 1981 creates substantive rights of its own that are redressable quite apart from Title VII. *See Johnson* v. *Railway*

Express Agency, supra, 421 U.S. at 457-61; and *Liotta* v. *National Forge Co., supra,* 473 F. Supp. at 1146. The Supreme Court in *Novotny* recognized this distinction in reviewing the effect of "contemporary legislation" on the 19th century Civil Rights Acts. ". . . [W]e held that the passage of Title VII did not work an implied repeal of the substantive rights to contract conferred by the same 19th century statute and now codified at 42 U.S.C. § 1981." *Great American S. & L. Assn.* v. *Novotny, supra,* 442 U.S. at 377 (*citing Johnson* v. *Railway Express Agency, supra).* As Title VII and § 1981 involve two independent causes of action, the procedures that are a part of Title VII enforcement do not affect the ability of appellant to proceed with his § 1981 claims.

Therefore, we hold that a § 1981 cause of action encompasses appellant's allegations of retaliatory conduct by the appellees following the filing of appellant's claim for racial discrimination with the EEOC.

For the foregoing reasons, the judgment of the district court is reversed and this cause is remanded to the district court for a jury trial not inconsistent with this opinion.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.